United States Court of Appeals

for the Second Circuit

APPENDIX

75-5024

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-5024

B

HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & Co., a Limited Partnership, Bankrupt,
Plaintiff-Appellant,

—against—

NEW YORK PRODUCE EXCHANGE *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

Volume IV
(Pages 1835a – 2469a)

UNITED STATES COURT OF APPEALS
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13

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Volume I

	PAGE
Relevant Docket Entries	1a
Amended Complaint	9a
Answer of Harry B. Anderson (deemed amended pursuant to stipulation)	30a
Answer and Counterclaim of Bunge Corp. and Walter C. Klein (deemed amended pursuant to stipulation)	46a
Answer of Continental Grain Co. and Harold H. Vogel (deemed amended pursuant to stipulation)	51a
Amended Answer of Sidney Fashena	55a
Amended Answer of Donald V. MacDonald	72a
Answer and Counterclaim of Merrill Lynch, Pierce, Fenner & Smith, Inc. (deemed amended pursuant to stipulation)	88a
Amended Answer and Counterclaim of New York Produce Exchange and Carl R. Berg	105a
Amended Answer of I. Usiskin & Co.	145a

PAGE

Amended Counterclaim of Merrill Lynch, Pierce, Fenner & Smith, Inc. 159a

Reply to Counterclaim of Bunge Corp. and Walter C. Klein 163a

Reply to Amended Counterclaim of Merrill Lynch, Pierce, Fenner & Smith, Inc. 166a

Reply to Counterclaim of New York Produce Exchange and Carl R. Berg 169a

Stipulation and Order Withdrawing With Prejudice Counterclaim of New York Produce Exchange 175.1a

Stipulation and Order Withdrawing With Prejudice Counterclaim of New York Produce Exchange, Fahnestock & Co., Merrill Lynch, Pierce, Fenner & Smith Inc., Bunge Corp. and Walter C. Klein 175.6a

Pre-Trial Order (Schedule A) 176a

Defendants' Request to Charge (Request #63) 192a

		PAGE
Trial Transcript*		
Witnesses	*Excerpted From Trial Transcript Pages:*	
Leuthold	[182- 355]	194a
Ellison	[355- 486]	243a
Dahl	[514- 865]	261a
Preston	[865-1069]	401a
Fontana	[1070-1148]	436a
Boyer	[1150-1337]	458a
Weinstein	[1367-1411]	474a
MacDonald	[1353-1987]	486a
Volume II		
Berg	[1988-2399]	685a
McMinn	[2404-2493]	853a
Fashena	[2495-2588, 2623-2677]	895a

* Colloquy and arguments have not been separately indexed.

PAGE

Trial Transcript*

Witnesses	*Excerpted From Trial Transcript Pages:*	
Rehders	[2677-2728, 2740-2747]	997a
DeAngelis	[2748-3064]	1025a
Gittleman	[3070-3170]	1132a
Anderson	[3171-3343]	1170a
Hankin	[3344-3360]	1275a
Fornari	[3360-3506]	1282a
Forti	[3509-3634]	1336a

Volume III

Klein	[3634-3754]	1371a
Groeneveld	[3758-3766]	1427a
Ferretti	[3768-3903]	1433a
Vogel	[3913-3982]	1479a
Ferretti	[3982-4103]	1521a
Stafford	[4104-4142]	1582a

* Colloquy and arguments have not been separately indexed.

PAGE

Trial Transcript*

Witnesses	*Excerpted From Trial Transcript Pages:*	
Totah	[4152-4194]	1594a
Worthington	[4194-4205]	1608a
Fribourg	[4205-4219]	1610a
Kenner	[4219-4242]	1620a
Ellison	[4270-4322]	1626a
Gray	[4322-4955]	1633a
Ellison	[5152-5219]	1796a
Arthur	[5236-5366]	1816a

Volume IV

Barton	[5368-5545]	1835a
Raclin	[5597-5670]	1920a
Farris	[5744-5938]	1982a
Gray	[5939-6008]	2033a

* Colloquy and arguments have not been separately indexed.

PAGE

Special Verdict 2133a

Final Judgment 2140a

Notice of Appeal 2143a

Documents filed subsequent to the Notice of Appeal pursuant to stipulation 2145a

Exhibit 52 marked at a deposition of John Ferretti appearing on behalf of Continental Grain Company 2145a

Documents filed in *Seligson* v. *Bunge Corp. and Walter C. Klein*, subsequently filed in this action with respect to the Harbor Tank issue:

Complaint 2146a

Opinion of Whipple, J., remanding the action to the Superior Court of New Jersey 2170a

Brief of Plaintiff in *Seligson* v. *Bunge Corp. and Walter C. Klein* 2174a

Stipulation between the Parties 2231a

Stipulation of Dismissal 2235a

Release 2236a

Memorandum in Support of Motion by Defendants Bunge Corp. and Walter C. Klein with respect to Certain Evidence 2239a

Appendix to the Memorandum in Support of Motion by Defendants Bunge Corp. and Walter C. Klein with respect to Certain Evidence 2264a

PAGE

Plaintiff's Memorandum in Opposition to the Motion by Defendants Bunge Corp. and Walter C. Klein with respect to Certain Evidence 2290a

Plaintiff's Memorandum in Opposition to the Defendants' Motion for a Directed Verdict 2337a

Excerpts of depositions of Richard Forti 2435a

Exhibits — Volume I

Plaintiff's Exhibits

Pl. Ex. 1 ..... 1e

Pl. Ex. 9 ..... 3e

Pl. Ex. 9a 3e

Pl. Ex. 9b 9e

Pl. Ex. 9c 13e

Pl. Ex. 9d 17e

Pl. Ex. 9e 21e

Pl. Ex. 10c 35e

Pl. Ex. 10g 39e

Pl. Ex. 12h id. 43e

Pl. Ex. 12m id. 51e

Pl. Ex. 13a id. 61e

Pl. Ex. 13b 65e

Pl. Ex. 15a 67e

Pl. Ex. 16f 69e

Plaintiff's Exhibits (cont.)

	PAGE
Pl. Ex. 17	73e
Pl. Ex. 18a-bb	75e
Pl. Ex. 25 id.	149e
Pl. Ex. 26 id.	151e
Pl. Ex. 27	153e
Pl. Ex. 28	155e
Pl. Ex. 30	157e
Pl. Ex. 41	159e
Pl. Ex. 45a-bb id.	171e
Pl. Ex. 45e	185e
Pl. Ex. 45o id.	215e
Pl. Ex. 45q id.	221e
Pl. Ex. 55	259e
Pl. Ex. 56	303e
Pl. Ex. 59 id.	391e
Pl. Ex. 62	423e

Exhibits — Volume II

Pl. Ex. 73	447e
Pl. Ex. 74	449e
Pl. Ex. 76	451e
Pl. Ex. 79	453e
Pl. Ex. 80	455e

Plaintiff's Exhibits (cont.)

	PAGE
Pl. Ex. 81	457e
Pl. Ex. 82	459e
Pl. Ex. 83	461e
Pl. Ex. 84 id.	463e
Pl. Ex. 87 id.	467e
Pl. Ex. 88 id.	471e
Pl. Ex. 89 id.	473e
Pl. Ex. 92 a-d	475e
Pl. Ex. 93	489e
Pl. Ex. 95	491e
Pl. Ex. 98	495e
Pl. Ex. 103 id.	501e
Pl. Ex. 113 id.	503e
Pl. Ex. 122	507e
Pl. Ex. 122a id.	509e
Pl. Ex. 123	511e
Pl. Ex. 123a id.	513e
Pl. Ex. 124	515e
Pl. Ex. 124a id.	517e
Pl. Ex. 125	519e
Pl. Ex. 125a id.	521e
Pl. Ex. 126	523e

Plaintiff's Exhibits (cont.)

	PAGE
Pl. Ex. 126d id.	525e
Pl. Ex. 127	527e
Pl. Ex. 130 id.	529e
Pl. Ex. 131 id.	531e
Pl. Ex. 131a id.	533e
Pl. Ex. 133	535e
Pl. Ex. 133a id.	537e
Pl. Ex. 134 id.	539e
Pl. Ex. 140	541e
Pl. Ex. 141	543e
Pl. Ex. 142	545e
Pl. Ex. 1447 id.	547e
Pl. Ex. 148 id.	549e
Pl. Ex. 149 id.	551e
Pl. Ex. 150 id.	553e
Pl. Ex. 151 id.	559e
Pl. Ex. 152 id.	561e
Pl. Ex. 153 id.	563e
Pl. Ex. 154 id.	565e
Pl. Ex. 156	567e
Pl. Ex. 158	569e
Pl. Ex. 166	571e

Plaintiff's Exhibits (cont.)

	PAGE
Pl. Ex. 187	573e
Pl. Ex. 188	575e
Pl. Ex. 189	577e
Pl. Ex. 190	579e
Pl. Ex. 193	581e
Pl. Ex. 200	641e
Pl. Ex. 204	647e
Pl. Ex. 208	655e
Pl. Ex. 217	663e
Pl. Ex. 219c id.	665e
Pl. Ex. 219d-1 id.	669e
Pl. Ex. 230	671e
Pl. Ex. 234	673e
Pl. Ex. 235	675e
Pl. Ex. 238	677e
Pl. Ex. 249	687e
Pl. Ex. 251	715e
Pl. Ex. 252	717e
Pl. Ex. 253 id.	721e
Pl. Ex. 253a-c id.	723e
Pl. Ex. 255 id.	769e
Pl. Ex. 255a	771e

Plaintiff's Exhibits (cont.)

	PAGE
Pl. Ex. 255b	785e
Pl. Ex. 255c	807e
Pl. Ex. 255d	829e
Pl. Ex. 258	833e
Pl. Ex. 260 id.	837e
Pl. Ex. 260a-f	Following 840e
Pl. Ex. 261 id.	841e
Pl. Ex. 261a-l	Following 846e
Pl. Ex. 262	847e
Pl. Ex. 266	849e
Pl. Ex. 267	853e

Exhibits — Volume III

Defendants' Exhibits

Def. Ex. 1a	909e
Def. Ex. 3	983e
Def. Ex. 4a	1009e
Def. Ex. 5	1011e
Def. Ex. 7	1037e
Def. Ex. 13	1091e
Def. Ex. 15	1095e
Def. Ex. 19	1105e
Def. Ex. 35	1107e

Defendants' Exhibits (cont.)

PAGE

Def. Ex. 106 id. 1111e

Def. Ex. 107 id. 1113e

Def. Ex. 146 ..... 1119e

Def. Ex. 204a-u 1139e

Def. Ex. 208 ..... 1189e

Def. Ex. 209 ..... 1193e

Def. Ex. 211 id. 1197e

Def. Ex. 214 ..... 1275e

Def. Ex. 215 ..... 1279e

Court's Exhibits

Ct. Ex. 2 ..... 1291e

Ct. Ex. 4 ..... 1292e

Ct. Ex. 5 ..... 1299e

Q As a regulator, Professor Arthur, would it be your general approach that any kind of attempted manipulation, you'd first see if the traders could take care ofit themselves --

MR. O'DONNELL: I object, your Honor.

Q Following that, if they couldn't, you would take some more action?

MR. O'DONNELL: I object to that on the ground that now there is assumption, he switches from what Allied was attempting to do and whether that was a manipulation to an assumption in this question that the regulators ofthe market knew the intentions of Allied.

MR. HARRIS: I will reframe the question and add the perception there.

Q I am speaking again to you as if you were in the role of a regulator, sir. Would it be your general approach when you perceived some potential manipulation or some activity that you might think related to an attempted manipulation, that your first defense, so to speak, you'd see if the traders could take care of it, and if the traders couldn't take care of it and it continued, then you'd take some additional action?

A I don't think I answered in that context. I think I said I would want to explore my own mind, not take a sequence of action. I'd want to say to myself, is this something that the arena, the give and take of the trading arena is going to take care ofit.

If I was satisfied that this had a very good chance of being successful, I wouldn't take further steps.

If, on the other hand, I felt that there were activities that the trading process wasn't going to take care of, if there were some things that needed to be aired, if there were complaints by other traders who said I am helpless, I would try to see what the most appropriate action fitted to the particular case in point would be.

Q You are familiar, are you not, with the operations in general of clearing houses, the role that the clearing house plays in the commodity markets?

A I think so.

Q If you were an exchange regulator in 1963, Professor Arthur, would you give credence to the opinion -- let me rephrase that -- if you were wearing the shoes of a regulator during 1963 would you be concerned if the head of the clearing association or the

clearing house of your market indicated to you that they were feeling some apprehension over increasing concentration of contracts in the hands of a relatively few clearing members?

A I'd be very happy he spoke to me.

Q I don't think that was my question, sir.

A Did you say would I be apprehensive?

Q Would you be concerned?

A Well, my concern would be that I had a letterhead of the clearing house and that I would like to see thatthe clearing house was performing its functions as a complementary part of the exchange by protecting the integrity of those transactions that the clearing house was responsible for.

Q If he head of the clearing house told you that they were large offsetting positions which were being established by apparently affiliated interests though the medium of ex-pit transactions and that clearing house believed that situation to be unhealthy and it was concerned that the position of the exchange and the clearing association might be jeopardized by that, would that have concerned you?

A I certainly would not ignore what the head of the clearing house told me. If this means

concerned, yes. I think that I would say that I wanted the clearing house to be assured that their obligations were as well protected as possiblewithin reasonable amounts of caution orassurance that the contracts would be honored and completed.

I would say if there were contracts short and long tendered and paired, I would expect them in all probability to be washed out by pairing. It wouldn't cause me that much concern compared to the way I might feel if somebody had taken an equivalent position on the basis that represented straight speculation.

Q If the clearing association told you as a regulator not only the facts that I have already mentioned but then stated to you that they suggested the exchanges, and that I am referring to you as a regulator, investigate the situation, would you conduct an investigation?

A I'm not entirely clear what my authority would be to conduct such an investigation. It's my impression that the manager of the exchange has to go aboard or somewhere else in order to get the authority to do such a thing, and he has other possible actions that he could take, and certainly shouldn't

Haupt & Company in 1959?

A As manager of their commodity department.

Q Who employed you at that time, sir, in Ira Haupt & Company?

A Mr. Ira Haupt, Sr.

Q There were several Mr. Haupts, were there not?

A Yes, sir.

Q Was this the old defendant Mr. Haupt?

A He was the old defendant.

Q All right, sir.

When he hired you to be manager of the commodities department at Ira Haupt & Company, did he tell you what kind of a department he wished that department to be?

A He told me it was a service department for the accommodateion of the security clients of the firm.

Q Will you tell us what your duties were as manager of the commodities department beginning in 1959 at Ira Haupt & Company?

A The work of the commodities department is almost wholly involved with a more or less complex accounting procedure which has to be performed in conformity with the

laws of -- with the bylaws and rules of the various exchanges and, of course, with those in the Commodity Exchange Authority.

I did one other thing. I wrote a market letter, a weekly market letter expressing my opinions of the commodities covered, with my reasons therefor.

(Continued on next page)

2A

elr1 Barton-direct [5374]

Q Was that market letter circulated beginning at the time to the customers of Ira Haupt and the personnel of Ira Haupt?

A Yes, it was circulated to the customers and the few branch offices that we had.

Q How oftenwas that market letter issued, sir?

A Weekly.

Q Beginning in 1959 were you a partner of Ira Haupt & Company?

A No, sir.

Q Were you ever a partner of Ira Haupt & Company?

A No, sir.

Q Did you as manager of the commodities department beginning in 1959 report to any partners of Ira Haupt & Company?

A It was one of the conditions of my employment that daily reports be made to a partner. Should I explain the nature of the reports?

Q Yes, sir.

A The reports were to submit the clearing house sheet to the partner, the volume of business done on that day, the list of new margin calls that went out, the list of margin calls that were met, and those margin calls which were becoming delinquent.

THE COURT: Would you read that answer back?

(Record read)

Q With respect to delinquent accounts or any other policy decision that had to b e made by Ira Haupt beginning in 1959 did you make the decision to what action would be taken?

A No, sir.

Q Who did?

A The partner.

Q Who was the partner beginning in 1959 to whom you started reporting?

A First, Mr. Goldsmith.

Q Mr. Goldsmith?

A Goldsmith, G-o-l-d-s-m-i-t-h.

Q As years went on, who was the next man?

A Mr. Scherck, I believe. And later Mr. Ira Haupt III.

Q What was Mr. Ira Haupt III's relationship with Mr. Ira Haupt, Sr.?

A Grandson.

Q Did Ira Haupt III have a nickname?

A Skipper.

Q Will you tell us about the size of Ira Haupt & Company when you started with it in 1959?

A I would say it was a moderate size firm.

Q Engaged in the securities buisness and also servicing securities customers with respect to commodities?

A That is entirely correct.

Q Is that commodities business, commodity business with respect to futures markets on various commodities on inventories exchanges?

A Yes, sir.

Q Including the New York Produce Exchange?

A That's right.

Q Did Ira Haupt & Company have any branch offices at that time?

A They had a few, sir. I don't recall how many.

Q Where was Ira Haupt & Company's principal offices?

A 111 Broadway.

Q Were you located there, sir?

A I was.

Q Beginning in 1959 did Ira Haupt & Company in the commodities department have many large commodities accounts?

A No, sir.

Q Would you describe, give us a general picture

of what kind of commodities accounts it had?

A These were mostly small speculative accounts, none of any large caliber.

Q Prior to 1963 did Ira Haupt have any customers who dealt at all in cottonseed oil futures on the New York Produce Exchange?

A We may have had a few small accounts, again, wholly speculative.

Q Do you recall the name Pacific Vegetable Oil Company?

A Yes, sir, I do.

Q Was that a customer in cottonseed oil figures on the New York Produce Exchange?

A It was our customer from our San Francisco office.

Q Could you give us some idea in which commodities the commodities department between 1959 and let's say 19 -- the beginning of 1963, which commodities the department traded in most frequently?

A It would be those commodities in speculative favor; that would be wheat, the gains, probably, because the newspapers reported those more frequently than they did theothers.

Q Would you give us some idea about the size of

the gross commissions that Ira Haupt made per year from its commodities by 1963? Just a rough figure.

A $300,000 to $350,000 annually.

Q Were any of the Haupt partners floor brokers on any of these commodity exchanges?

A No.

Q How did the commodities department at Ira Haupt between 1959 and the beginning in 1963 do if it wished to engage in a futures transaction on any of these exchanges, including the New York Produce Exchange?

A We employed an indpendent floor member who made these trades for us in the pit and for which service we paid him a floor brokerage of $2 or $3 per contract.

Q Did Ira Haupt & Company ever trade in commodities for its own account?

A No, sir.

Q It was always just acting on behalf of customers?

A It was.

Q Did Ira Haupt & Company have internal auditors in its employ, to your knowledge?

A Yes, it did.

Q Did Ira Haupt & Company have an outside accounting firm to do annual audits of the firm?

A Yes, it did.

Q Do you remember the name of that outside accounting firm?

A I don't remember, sir.

Q Would the name Peat, Marwick, Mitchell & Company refresh your recollection?

A It would. It does.

Q Was that the independent outside accounting firm?

A I believe so.

Q You have told us that you reported to at first to Mr. Goldsmith, and then if I have it right, to Mr. Scherck, both of whom were partners at Ira Haupt, and later to Mr. Haupt, known as Skipper Haupt?

A Right.

Q For about how long did you report to Mr. Skipper Haupt in connection with the commodities department? Until what point in time?

A Until about mid-'63, when upon the death of his grandfather he had to leave the firm and go into business with his father, who was a specialist on the New York Stock Exchange.

Q So that was the summer of 1963, was it, that Mr. Haupt II and Mr. Haupt III left the firm of

Ira Haupt & Company?

A Mr. Haupt II I don't believe was a member of the firm, but Mr. Haupt III, Skipper, did leave then.

Q Upon his grandfather's death, is that it?

A Yes.

Q That was about July '63, or shortly before that?

A June or July '63.

Q So that when Mr. Skipper Haupt left the firm at that time, you began reporting to somebody else, did you say?

A Mr. Scherck.

Q Mr. Scherck or Mr. Stevens?

No, Mr. Scherck for a short period. I had not yet been apprised of the fact that Mr. Stevens had taken over.

Q So you again started to report to Mr. Scherck, to whom you had reported earlier?

A I had to report to a partner.

Q Then did there come a time when you stopped reporting to Mr. Scherck?

A There did.

Q When was that, sir?

A Skipper called me one morning and told me that

he was leaving the firm and that I should thenceforth report to Mr. Stevens. The next day Mr. Stevens called me and confirmed that, said I was to report to him.

Q Is that a Mr. Jack Stevens?

A Mr. Jack Stevens.

Q At the time what was Mr. Jack Stevens' position with Ira Haupt, if you know?

A He was the controller, sir.

Q During the period of time that you reported to Mr. Skipper Haupt prior to the summer of 1963 will you tell us how you reported to him? Orally or in writing.

A It was orally, substantiated by the documents I mentioned before. We took in the copy of -- our copy of the clearing house sheet, which showed our position and the amount of monies we paid to the clearing house or would receive from the clearing house the next day: a written record showing the volume of trading that day; another record showing the margin calls, the new ones and the old ones.

Q Did you observe Mr. Haupt, Skipper Haupt, do anything with respect to any of those reports?

A He examined those carefully and would give us instructions regarding the disposition of margin calls that had not been met.

Q Did the statements that you furnished Mr. Skipper Haupt reveal to him the amount of trading by the firm or the exposure of the firm due to long or short net balances?

A Yes, it did, because it contained every item of business we did during the day.

Q During the period that you were reporting

to Mr. Skipper Haupt immediately prior to the summer of 1963, did you report to any other partners of Ira Haupt as well?

A No, sir.

Q Did you continue to furnish the kind of reports that you have described that you furnished to Mr. Skipper Haupt, after Mr. Skipper Haupt stopped supervising your work, and Mr. Stevens began doing it?

A Yes, with one addition. Immediately after Mr. Stevens told me that he was now in charge of the department and that I would report to him, I went up to him and suggested we devise a form which would show our entire position in all commodities and show also the position of the soybean oil and cottonseed oil complex which was developing.

I wanted to be sure that he saw the entire position and the new oil business that we were then beginning to do.

Q Did there come a time during this period between 1959 and the summer of 1963 when your duties at Haupt changed in any material respect?

A Yes. We had opened an office in Los Angeles, possibly about the end of 1962, and early in '63 Skipper told me he wanted to expand the scope of the department,

that he wanted me to pay more attention to forecasting and research work, and that I was to let most of the accounting duties, that I was to give most of my accounting duties over to my assistant, Sy Glassgold.

Q Were Haupt's bookkeeping functions done manually or on a computer, or how?

A They were done manually until the summer of '63, when Stevens had completed the conversion of the securities bookkeeping to the computer, and was then devoting his attention to transferring the commodity bookkeeping to the computer also.

Q Did there come a time when you were out of the office due to illness, in the fall of 1963?

A Yes. I was out from -- my last day in September was September 27th, Friday night, and I came back on Monday, November 11th.

Q Will you tell us whether you were in the hospital at all during that period?

A I was in the hospital from about the 4th or 5th of October until the 18th, and I was home thereafter.

Q So you were not at Ira Haupt physically on the premises to work, Friday September 27th until Monday, November 11th, is that right?

A The interim period, yes, that is correct.

Q Did anybody take over your functions, to your knowledge, while you were gone?

A Glassgold.

Q He continued the administrative bookkeeping and clerical functions of the Commodities Department?

A He did.

Q Did you have any talks with Mr. Glassgold while you were out of the office as to whether he was doing any reporting to Mr. Stevens?

A I called Mr. Glassgold from the hospital about the 5th or 6th -- about the 6th or 7th of October and asked him to be sure to report to Mr. Stevens the same way as we had always done and to be sure that no change was made by him that was not confirmed by Mr. Stevens. He said he would.

Q And as far as you know, Mr. Glassgold continued to give Mr. Stevens the reports that you had given, is that right?

MR. KIRSCH: Objection, your Honor.

I think he is calling for hearsay.

THE COURT: So far as he knows.

A I know, because Mr. Glassgold called me.

THE COURT: No, you can't say that. Just as

Q Had you ever heard of Mr. DeAngelis or Allied Crude Vegetable prior to that time?

A I had heard of Mr. DeAngelis prior to that.

Q In what connection?

A In the failure of the Gobel -- I forget the name --

Q Adolph Gobel Company?

A Gobel Company, who was involved in the large futures in 1951 and 1952 and couldn't meet their obligations on the contracts that they had cleared through us when I was with Paine, Webber.

Q What did you hear about Allied Crude Vegetable in the fall of 1962 when you first heard about that company?

A From a memorandum from Skipper Haupt relating a proposal that we lend money to Allied Crude Vegetable Oil.

Q The memorandum was a proposal that Ira Haupt & Company lend money to Allied Crude Vegetable Oil?

A In exchange for futures business, yes.

Q In exchange for futures business of Allied on which Ira Haupt would receive commission?

A That is correct.

start over again. I'm sorry.

We went to the office of Mr. Froelich.

Q Mr. Froelich?

A Yes, Froelich, a vice-president of the bank.

Q What happened at Mr. Froelich's office? You and Mr. Skipper Haupt went, did you?

A That's right. Skipper told him what the purpose of his visit was, and we were shown a dossier possibly about two inches thick covering Allied Crude Vegetable Oil and Anthony DeAngelis.

We looked through the dossier rather carefully.

Q Do you remember what it contained?

A Sir?

Q Do you remember what it contained?

A It contained -- I'm trying to get the proper word for it. Let me use the word trouble between DeAngelis and the Department of Agriculture -- not the Department of Agriculture, with certain foreign countries to whom he had delivered oil, which was not acceptable. It contained, of course, the reference to the Gobel failure.

There were other things in there, sir, which were of a disturbing nature. I don't recall them at the moment.

Bayonne?

A In the spring. The first meeting with Allied was exploratory.

Skipper wanted business, DeAngelis wanted money.

Q When you say, "Skipper wanted business," was this part of the expansion plans of Ira Haupt & Company?

A It was part of the expansion plans of Ira Haupt.

Q With respect to the two meetings in Bayonne, New Jersey in the spring of 1963, Mr. Barton, can you separate those two meetings in your mind, sir?

A Not precisely, but I can give you the substance of the important things that happened.

A I believe I have. You asked me a question, sir?

Q Yes, sir. Will you tell us what you recall the parties said to each other at either or both of the meetings as you recall it?

A Skipper -- in the exchange of ideas between Skipper and Mr. DeAngelis, Skipper offered a loan of $1 million .

Mr. DeAngelis said he required two and a half million dollars because that was the value of a shipload of oil.

I believe Skipper agreed to it.

We had had a discussion as to -- before I make this statement I should say that Mr. Froelich in answer to Mr. Haupt's question told us that if we wanted to make accommodations to Allied, they would tell us what documents to obtain for our protection.

The documents were a warehouse receipt at a prearranged premium above the value of the note, a note for three months, an export contract with a prime name, a certificate of insurance, a guarantee by -- no, the guarantee came later. I believe that's all.

At one of the two meetings I suggested that the export contract -- that we have the right to confirm

gr3 Barton-direct [5399]

the validity of the export contract.

Mr. DeAngelis demurred. He said, "I would rather you not confirm the contract because I don't want them to know with whom I'm doing business."

This demur was the reason we asked for a guarantee by DeAngelis that the export contract was unencumbered.

At the first meeting I asked Mr. DeAngelis why he had recently been cited by the Chicago Board of Trade.

I don't know what he had done.

He told me that he had been cited for undue activity resulting from the fact that he had a position with a clearing member that he wanted to transfer to another clearing member.

The rules of the exchanges provide that that transfer may be made in an ex-pit transaction.

Q This is just transferring contracts from one brokerage firm to another?

A From one clearing broker to another clearing broker.

Mr. DeAngelis explained that he didn't want the brokers to know their identities.

Therefore, he told the carrying broker to sell

his contracts at the market and gave orders to the other broker to buy them at the market, creating exceptionally heavy trading whihc was not permitted by the exchange.

Q That was a wash sale, was it not?

A It was, in effect, a wash sale. There was no change of ownership.

On the way back that afternoon I mentioned to Skipper that I didn't like two things. First, to be restrained from confirming the export contract, and, secondly, I didn't like Mr. DeAngelis' attitude in the sense that when he was confronted by a restriction or restraint and he wanted to accomplish what he wanted to do, he wasn't mindful of the restraint or the restriction imposed upon him.

Q If I have this straight with respect to this wash sale, this was with respect to soybean oil futures on the Chicago Board of Trade?

A Yes.

Q Mr. DeAngelis could have transferred from one clearing brokerage firm contracts to another clearing brokerage firm by an ex-pit transaction; is that right?

A That is right.

Q But he did not do so, instead he arranged

4A

elr1 Barton-direct [5404]

Q Did he ever furnish one, to your knowledge?

A Well, Skipper asked for it several times until the end of May. When it came to him to sign the letter of intent, then Mr. DeAngelis brought over what he claimed to be a financial statement.

Q Was it a certified financial statement prepared by outside accountants?

A I never saw it, sir.

Q You never saw any such certified financial statement of Allied?

A That is correct.

Q Was this proposed loan from Ira Haupt & Company to Allied in return for its futures business usual for a brokerage firm to do, to your knowledge?

MR. KIRSCH: Objection, your Honor.

THE COURT: The objection is sustained.

Q Was it consistent, to your knowledge, with the brokerage business, at this time in 1963, to make this kind of loan to Allied?

MR. KIRSCH: Objection, your Honor. On the same basis.

THE COURT: Objection sustained.

Q You toldus earlier, Mr. Barton, that Mr. DeAngelis offered to give you a personal guarantee that

elr Barton-direct [5405]

the export contracts were unencumbered?

A He did.

Q And following the request that there be a verification of the export contracts, which Mr. DeAngelis didn't want to do, did Skipper Haupt insist on that verification?

A He did not. He accpeted it.

Q He accepted the guarantee instead of the verification, is that right?

A Yes.

Q To your knowledge, Mr. Barton, had any of the brokerage firms that you had been with prior to the time you went to work for Ira Haupt & Company made any loans to customers in return for the commodities futures business?

A No, sir.

Q Had Ira Haupt & Company prior to these discussions in the spring of 1963 made any loans to customers in return for their futures business?

A None whatever.

Q You referred to a letter of intent, sir?

A I did.

Q Will you tell us what the discussions were with respect to a letter of intent and what was done, if

Q Were there any comments made by Mr. DeAngelis and Allied during the meetings?

A I recall one comment, when Mr. Kamerman asked, shall we do business with Allied, Mr. Marks said, he is a crook. Mr. Kaufman -- oh, Mr. Marks said, I wouldn't do business with him. Mr. Kaufman said, I will go along with Mr. Marks; I wouldn't do business with him.

And Mr. Kamerman asked me, I said, you know my original position, but I don't know under what conditions we are now considering to do business with him. So I expressed no pinion at that time.

Q In any event, did there come a time when there was a letter of intent prepared and executed by Ira Haupt & Company and Allied?

A There was.

Q I show you Defendant's Exhibit 15, I believe it is for identification -- I apologize for the fact that it isn't a better Xerox --

MR. KIRSCH: Excuse me, we have uncovered what I believe is the original.

MR. O'DONNELL: May I hand this copy, then, to your Honor.

(Pause.)

worth of collateral oil.

Q Did Ira Haupt & Company have any procedure to determine whether a signature on a field warehouse receipt was genuine?

A No, sir.

Q To your knowledge, did Ira Haupt ever ask the Chase Bank to check on the authenticity of any of these warehouse receipts?

A Not to my knowledge, sir.

Q There was a two and a half million dollar loan made, was there, following the letter of intent at the end of May?

A There was.

Q Was that paid off within the 90 days, Mr. Barton?

A That was paid off within the 90 days.

Q Was it promptly renewed?

A It was renewed.

Q Before you became ill, Mr. Barton, and went out of the office on Friday night, September 27th, were you told anything about whether Allied wanting a loan in addition to the two and a half million dollars maximum?

A Yes, sir.

Q What were you told and by whom at that time?

A Sometime about the middle -- first half or the middle of September 1963 Mr. Newman told me that Allied wanted to borrow $700,000 for one week. I took him up to see Mr. Stevens. I told Mr. Stevens -- I asked Newman to tell Mr. Stevens what Allied wanted to do. Then I told Mr. Stevens this was a breach of the two and a half million dollar ceiling that had been imposed by the letter of credit.

I believe the loan was extended and repaid within the week.

Q So the loan was made in excess of the two and a half million dollar limitation?

A It was.

Q And how much was it, sir?

A I believe it was $700,000.

Q Did I understand you that you actually told Mr. Stevens that was in excess of teh two and a half million dollars?

A I did.

Q This was when, in early September, you say?

THE COURT: Mid-September.

A Mid-September or possibly early September.

Q Had you ever discussed this two and a half

million dollar limitation with Mr. Stevens any earlier than that, not with respect to this loan, but generally?

A Early in my association with Mr. Stevens I reminded him there was a letter of intent setting forth the conditions of export loans. That is all I did.

Q Were there any other loans made in September to Allied in excess of the two and a half million dollars?

A I have been told and I have been shown the records that a million dollar loan was made, but I have no recollection of it.

Q Do you know whether any loans were made in October 1963 in excess of the two and a half million dollars?

A There were loans made in October.

Q Do you remember in approximately what amount? Would six million dollars refresh your recollection?

A No, five million dollars.

Q When you returned to the office on Monday, November 11th, what was the total of export loans --

A Ten million dollars.

Q -- to Allied?

A Ten million dollars.

5B

gr1 Barton-direct 5418

Q I just spoke about product loans.

Will you tell us what a product loan or a product margin loan is?

A That was a creation between DeAngelis and Ira Haupt when I was away from the office.

There was a suggestion by DeAngelis that he put up part of the original margin in cash. I believe it related to the cottonseed oil, where the martin at that time was $400 per contract.

He would put up $100 per contract and the balance in the form of a product loan.

Unfortunately that was extended to soybean oil contracts.

Q So part of the margin then was in cash dollars and part was in warehouse receipts; is that it?

A A loan against a warehouse receipt.

Q Prior to the time that you got sick, September 27, 1963, had there been any product margin loans between Haupt and Allied?

A None whatever.

Q That occurred after you left, beginning in October, did it?

A That's correct.

Q Had there been any product margin loans by Ira

Haupt prior to October 1963 for any customer in the commodities departments?

A No.

Q Had you had any produce margin loans in any of the commodities departments of the other firms that you had been with in the commodities field prior to the time you went with Ira Haupt?

A No, sir.

Q What happens if you have a product margin loan, Mr. Barton, and the price of the futures on the futures exchange drops? What happens with respect to variation margin?

A If the price in futures drops, then the clearing house calls us for the full amount owing between the last computation date, which was the day before, and night's close, and we have to send a check to the clearing house and, of course, then it becomes incumbent upon us to get it from our client.

Q Does it --

A Also the value of the warehouse receipt drops, and to the extent that his margin on the warehouse receipt is impaired, we have to ask him for that, too.

Q If you had margin that was completely cash dollars and not product margin, as the price of the

Allied Crude Vegetable Oil for all the monies that were due us in variation margin.

Q What was your procedure with respect to variation margin was being paid by the clearing association to Haupt because the price of cottonseed oil futures was rising?

A At the end of the day we would compute the amount of money that we should receive from Allied on the basis of new commitments of cottonseed oil that he instituted that day, plus or minus the variation margin. At the time that I made the computation I never gave Allied the full amount of money owing them. I held some of it back as a prudent measure.

Q Was that okay with Mr. DeAngelis?

A No, sir.

Q What did he say?

A He protested, and I told him that I didn't have time, he was keeping us so busy, I didn't have time to separate the calls the way he wanted them. He said, well,you always call me for what you want, but you never give me what I think is coming to me. That condition changed when I went into the hospital.

Q When you went into thehospital, he began getting every last cent of the variation margin he was

entitled to, is that correct?

A That's correct.

Q And do you remember when the variation margin worked the other way, or original margin payments were required,what while you were there did Haupt require Allied to do with respect to paying money from Allied to Haupt? What form did you ask that the payments be made in?

A While I was there, they were paid to us in the form of a check. But after the end of September when the number of contracts increased, then the amount of variation margins and original margins increased to the point where a payment that was to have been made on Friday would have been received on Monday, causing the firm to lose interest for three days on the amount of money involved, so it was arranged that they would pay us in the form of federal funds. We would get the money the same day.

Q Do you recall what the flow of variation margin was in the fall of 1963? Was the clearing association paying money to Haupt and Haupt to Allied, or the other way around?

A On the basis of daily fluctuations there were days when they paid us, there were days when we paid

the clearing house. Now that it's 12 years away, I don't remember what the trend of prices were; if the prices were on an ascending scale, then of course we would have recieved money from the clearing house which would have been given to DeAngelis.

Q Do you recall that prior to the time that you went off to the hospital, September 27 or shortly thereafter, prior to that time that you had any problems with DeAngelis in connection with be delivery of either cottonseed oil or soybean oil?

A It was in connection with aoybean oil, and may I be permitted to talk about it?

Q Please.

A We had accumulated a quantity of soybean oil futures in Chicago,on instructions of Mr. DeAngelis I shipped them to Bayonne in order to retain title in the name of Ira Haupt & Company, I shipped them on an ordinary bill of lading.

When they reached a cumulative volume of about a quarter of a million dollars, I called Mr. Rotello, I believe, and asked for a payment. I had the bill of ladings, and he told me that he would make payment.

Shortly after, as the cars were moving into Bayonne, they had accumulated to a probable volume of half a million dollars. This time I called Mr. DeAngelis and told him that we had borrowed money on these, it was costing us money to hold these bills of lading, and I asked him for a payment. He said, Fred, I don't need it at the moment, but I will pay you.

He did pay a small portion of it, and I finally got payment, or rather the firm finally got paid on it, I believe on the 5th of September 6-8 cottonseed oil transaction in which I suggested to Mr. Stevens that as a condition of our taking it he pay us for the accumulated bills of lading that he had not yet paid for.

Q So that you went from sometime in July 1963

until early September 1963 waiting for your money from Allied, is that right?

A That's right. May I add, sir, that in the interim I expressed to Mr. Stevens my fears that Mr. DeAngelis was stalling.

Q Mr. DeAngelis was what?

A Stalling.

Q He was stalling, was he not, with respect to that?

A He was.

Q And in effect that was an extension, forced extension by Haupt of an additional credit in excess of --

MR.KIRSCH: I object to the question, your Honor.

Q I will reframe it. Did that amount of unpaid bills of lading from July until early September of 1963, in effect amount to an extension of credit by Haupt to Allied?

A It did.

Q You said you spoke to Mr. Stevens about that stalling?

A I did.

Q Do you recall that prior to the time you

got sick, and I guess perhaps earlier in August, 1963, you had a conversation with Mr. Stevens in which he asked you some questions about how brokerage firms should operate in the commodities market?

A He asked me two questions at that time. First, in the event that the oil markets were to decline, how far would they decline, in my opinion.

Second, what had been the -- what has been the street actitude toward the amount of oil that any one firm would accept from a customer in relation to the total open position.

In answer to the first question, I said that the price of oils are not excessively high; so that in the event that the price should decline either by an unforeseen development or by good crop conditions, I thought that the price of oil might go two, two and a half cents down.

In answer to the second question, I said, for years it has been the policy in the street to keep the position to about five per cent; the position that one customer may have in relation to the total position, about five per cent.

And in the case where the client was a nationally known firm with securities listed on the

New York Stock Exchange, they might go to about ten per cent.

THE COURT: You mean the brokerage firm would have one customer with ten per cent of its entire brokerage in commodities.

THE WITNESS: Open position in that particular commodity, sir.

THE COURT: In that particular commodity?

THE WITNESS: Yes, sir.

Q That is ten per cent of the total open position to the commodities market of that product?

A On the particular commodity.

Q Yes. So that in the case of the New York Produce Exchange in cottonseed oil futures it would be ten per cent of the open position on that market?

A Right.

Q That was your rule of thumb, was it, sir?

A That was my rule of thumb.

Q That 10 per cent that you are talking about as a rule of thumb for the brokerage firm is with respect to one customer?

A One customer, nationally known, with securities on the New York Stock Exchange.

Q Why or where did you get that rule of thumb?

What was the purpose of it?

MR. KIRSCH: Can we have the questions separated? Where did he get it, and then what was the purpose.

Q Do you recall why you had this rule of thumb at the time? Was that just a conservative procedure?

A The larger the position that the clearing member carries, the greater the exposure to its capital in the event that the client carrying the large position fails.

Q When you are speaking about this five or ten per cent, you are speaking about the net position in the futures market that the one customer has, are you not?

A The net position, sir, yes.

MR. O'DONNELL: Could we mark this document, please, as Defendant's Exhibit 4-A for identification.

(Defendant's Exhibit 4-A marked for identification.)

Q I show you, Mr. Barton, a document which has been marked Defendant's Exhibit 4-A for identification. You will see it is dated June 28, 1963, and is addressed to Ira Haupt & Company.

Do you recognize this document with respect to Allied Crude Vegetable?

(Mr. O'Donnell read from Defendant's Exhibit 4-A in evidence to the jury.)

Q Mr. Barton, with respect to conversations with Mr. DeAngelis prior to the time that you became ill, did you ever have any conversations with him in which he spoke to you about buying and selling soybeans themselves?

A Yes, he did.

Q Would you relate that conversation to us.

A Early in September Mr. DeAngelis called me on the telehone and he said, "Fred, I want to give you a lot of soybean business."

MR. KIRSCH: Objection, your Honor.

I don't see why we have to get into soybeans.

MR. O'DONNELL: Your Honor, this is with respect not to soybeans but to the subject of Mr. DeAngelis and Ira Haupt.

Your Honor, this has to do with a fact that I consider significant with respect to what Ira Haupt knew about the man DeAngelis.

MR. KIRSCH: In the first place, it is just what Mr. Barton said to Mr. DeAngelis. It obviously has to do with soybeans.

MR. O'DONNELL: This communication was made

by this gentieman to Mr. Stevens.

THE COURT: To Mr. Stevens?

MR. O'DONNELL: Yes. There was a conversation between Mr. DeAngelis and Mr. Barton which Mr. Barton in turn passed along to Mr. Stevens.

MR. KIRSCH: Your Honor --

THE COURT: I don't want to hear the conversation from him and DeAngelis. What he said to Stevens, if it relates to Allied as a credit risk or Haupt or anything like that, that is fine.

MR. O'DONNELL: It relates to the integrity of Allied, your Honor.

THE COURT: All right. Then I think it is admissible.

Q Will you tell us about the conversation you had with Mr. Stevens following the conversation with Mr. DeAngelis.

A As soon as my conversation with Mr. DeAngelis was completed, I went up to Mr. Stevens and I told Mr. Stevens that Mr. DeAngelis had suggested that he buy five million bushels of soybeans for his own account and sell five million bushesl for the company account.

I told Mr. Stevens then that I told Mr. DeAngelis that if I comply with this request, and

out sick did you call him again?

knowing that Mr. DeAngelis was bullish on the price of soybeans, that they would go up, that I would be entering into a conspiracy with him, that if the price went up, to take money out of the treasury which would be lost by the company on the short sale and put it into his pocket.

I told Mr. Stevens that I told Mr. DeAngelis that that was not allowed.

Then I said to Mr. Stevens, "This is the measure of the man you are dealing with."

There was no further conversation. So I went back to my office.

Q Did there come a time in September 1963 when, to your knowledge, Haupt engaged in ex-pit transactions with Peters for Allied's account?

A Yes, sir.

Q That was with Ralph Peters & Company, was it?

A Yes, sir.

Q Will you tell us about that transaction.

A I recall that Mr. Stevens called me to his office and informed me that he wanted to take over a large quantity of cottonseed oil for the account of Allied.

I demurred as usual.

Then as a second thought I asked what maturity.

He replied, "They are mostly Octobers."

Then I stated, "If they are mostly Octobers, we will be rid of them by the first notice day," which is toward the end of September.

In the event that you want to take them, I won't have too much objection, but I suggest that we get from Mr. DeAngelis a statement that he will not demand delivery of this -- I believe it was around 3,000 contracts.

And, in addition thereto, that we get paid for the bills of lading which were still unpaid.

THE COURT: That is the transaction you already told us about. That is the ex-pit transaction that you already told us about in which you got paid for the soybean oil.

MR. O'DONNELL: Bills of lading.

THE WITNESS: This was the transaction for which I wanted as a quid pro quo the payment of the bills of lading.

THE COURT: All right. That is how you got paid?

THE WITNESS: Yes.

THE COURT: All right.

Q What was the reason for the ex-pit transaction

A November 8. And these figures are -- oh.

between Peters and Haupt at that time; do you know?

A Mr. DeAngelis wanted to transfer a position he had with Peters to Ira Haupt & Company, and that was done by a simple 6-A transfer in which the client requests the first carrying broker to transfer the position to the second carrying broker.

Q As I understand it, you had no objection if Allied or DeAngelis guaranteed they would not accept delivery of the October contracts; is that right?

A That is correct.

Q And did Mr. DeAngelis agree to that?

A He did.

Q Did you tell anyone about this outside of Haupt?

A Yes. Because of my concern about the DeAngelis and Haupt matter, I made it a pointon a large transaction like this to be sure to call Mr. Berg.

Q Mr. Berg of the New York Produce Exchange?

A Secretary of the New York Produce Exchange, not because I didn't know how to handle it, but because I wanted to apprise him of what was happening.

I called him and told him that we were going to -- it had been proposed that we transfer these contracts from Peters to Haupt, and I told him that I

would notify the secretary's office as required by the by-laws when that was completed.

He said, "That is all you have to do."

Q Was anybody present during your conversation with Mr. Berg?

A Mr. Kamerman was present, sir.

Q Was Mr. Stevens present also?

A Mr. Stevens was present -- no, I beg your pardon. Let me put this into the right situation.

I called Mr. Berg from Mr. Stevens' office and Mr. Kamerman was there at the time.

Q Were you satisfied by Allied's guarantee not to take delivery of the October contracts?

A Mr. Stevens asked me what happens if he doesn't honor his commitment.

So I told him that with that commitment in hand, I could go to the Produce Exchange or the Commodity Exchange Authority, both of which prohibit any attempt to squeeze.

Q While you weren't particularly satisfied then with the guarantee, you thought it might be of some use?

A At least we could prove to the authorities that we took the precautions it would have been prudent for us to have taken.

THE COURT: I assume you told Mr. Stevens.

gr3 Barton-direct

back. I think this was a liquidated --

THE COURT: I can't hear you, Mr. Kirsch.

Q What happened to the October contracts that were ex-pitted originally from Peters to Haupt?

A The October contracts were liquidated on September 23, I believe.

Then on September 30 we had another ex-pit transaction. I learned that from Sy Glasgold, who called me. He told me that on an ex-pit transaction involving the exchange of warehouse receipts for --

MR. KIRSCH: Your Honor, I object towhat Sy Glasgold told him about a transaction between Haupt and Allied while he was out of the office.

MR. O'DONNELL: He was a Haupt employee at thattime, your Honor. They both were, you r Honor. He can testify as to what a Haupt personnel told him.

THE COURT: I'm not sure, Mr. O'Donnell. I will allow you to say what Stevens said or one of the partners said.

MR. O'DONNELL: Perhaps I can get at it this way, your Honor.

THE COURT: All right.

Q Let me show you Defendants' Exhibit 35 for identification and ask if you recognize that as a letter

Mr. Stevens' office.

of yours to the New York Produce Exchange dated September 26, 1963?

A I do, sir.

Q Did you send this letter to the New York Produce Exchange on September 26, 1963?

A I did, sir.

Q Does it have attached to it a letter which you also sent to the exchange, this letter being from Allied?

A It does.

Q This letter is dated September 26, 1963 from Mr. Gittleman to Peters with a copy to Ira Haupt; is that right?

A Right. Thatis correct.

Q And it has an attachment on the logo of Ira Haupt & Company showing various tank locations, does it?

A I believe this includes -- this covers the -- that is right, the warehouse receipts covering the tank locations. I'm sorry.

Q Then is the final letter a letter or a copy of a letter by Mr. Berg to you dated October 8, 1963 acknowledging the receipt of the papers?

A Yes, it is.

Q Does this document refresh your recollection that there was an ex-pit transaction on or about September 26, 1963 where 2454 October cottonseed oil contracts were sold to Ralph Peters & Company?

MR. KIRSCH: Your Honor, I don't object to the documents being put into evidence. If he's not going to, I would. I certainly concede this is what happened.

MR. O'DONNELL: I offer them.

THE COURT: All right.

(Defendants' Exhibit 35 was received in evidence)

MR. KIRSCH: I similarly have no objection to the September 30 transaction, that he started to try to get indirectly. Let him put it in directly with the documents.

THE COURT: All right.

MR. O'DONNELL: May I read this to the jury? It's short, your Honor.

(Mr. O'Donnell read from Defendants' Exhibit 35 in evidence to the jury)

MR. KIRSCH: That's on the letterhead of Allied; is it not?

MR. O'DONNELL: Yes.

gr6 Barton-direct [5448]

(Mr. O'Donnell continued reading from Defendants' Exhibit 35 in evidence to the jury)

Q With respect to this transaction, Mr. Barton, do you recall having a discussion with Mr. Berg at or about the time of it?

A This was the -- yes. Again, Mr. Stevens called me to tell me that he was going to -- that DeAngelis was going to liquidate these positions in a 6B transaction involving the exchange of futures for warehouse receipts.

I then called Mr. Berg and asked him what documents I should ask for because I was somewhat unfamiliar with the 6B transaction.

He told me to get the documents which we have there, something indicating a contract.

Q Do you recall him telling you you should see the warehouse receipts for your protection?

A Yes, he did.

Q Did Haupt take back an ex-pit from Peters of 2454 December contracts subsequent to this transaction?

MR. KIRSCH: I object to the phrase "take back."

I have no objection to the transaction on

gr7 Barton-direct 5449

September 30th in which there was a subsequent purchase from Ralph Peters of 2454 December cottonseed oil contracts.

Q Did Haupt receive from Peters in an ex-pit transaction December contracts subsequent to this trans-a-tion?

A On September 30.

Q Four days after the one we have just read to the jury?

A That's right.

Q When you ex-pitted the 2454 October cottonseed oil contracts on September 26, 1963, did you know that Haupt was going to obtain contracts from Ralph Peters a few days later?

A I didn't have any idea whatsoever.

Q Was there any prearrangement to do that that you had knowledge of?

A No, sir.

Q Do you know, sir, that Haupt had to fill out a questionnaire to the New York Stock Exchange around September 26, 1963?

A Yes, I'm familiar with that.

Q In that questionnaire did the long position of Haupt with respect to either October or December

contracts show up as a charge to capital?

A In the computation, the ansering of that questionnaire, we had to accumulate all our long positions and all our short positions,and a charge, a percentage charge was made against the total valuation and deducted from our capital.

Q Was the fact that on September 26 Haupt was not long those 2454 contracts helpful to Haupt's net capital position?

A It would have been helpful in the event that they needed -- let me answer the question simply yes.

Q Was it Stevens' responsibility to prepare the net capital ratio?

A It was.

Q Did he know the requirement to file the questionnaire prior to September 26, to your knowledge?

A May I have that question again?

Q Did Mr. Stevens know of the requirement to file the questionnaire prior to September 26, to your knowledge?

A I believe it's the custom of the New York Stock Exchange to notify them about a week ahead of time.

Q So Mr. Stevens knew about it, to your

knowledge?

A Yes, sir.

Q When you left Haupt on September 27 because of your illness -- when I say left, temporarily because of your illness -- what was the condition of the Allied account, as you knew it?

A As I remember --

MR. KIRSCH: Excuse me, your Honor. I don't know what condition of the account means.

Q What was the Allied account?

MR. KIRSCH: The number of contracts?

MR. O'DONNELL: Yes, the number of contracts.

MR. KIRSCH: Fine.

A About 2500 contracts. I may be off a little bit.

Q You have already told us there was about $2.5 million in loans outstanding also?

A That's correct.

Q When you returned in November, what was the number of contracts that were outstanding with Allied?

A A total of about 15,000 contracts.

MR. KIRSCH: Objection, your Honor. He's going into soybean oil now, too.

Q Will you break out the 15,000 contracts as between soybean oil and cottonseed oil.

A Cottonseed oil, about 8800, I believe, if that figure is correct. I'm not too sure of it.

Q 8800 cottonseed oil?

A 8000 contracts of cottonseed oil.

Q And about 7000 of soybean oil?

A Roughly 7000.

Q What was the situation with respect to outstanding loans at that time?

THE COURT: He already told us that.

MR. O'DONNELL: All right.

THE COURT: I think the amount is $13 million.

MR. O'DONNELL: Yes, your Honor.

Q While you were sick during October 1963, did you keep in touch with Haupt about the Allied account, sir?

A Yes, I did.

Q Will you tell us what that consisted of?

A I called Mr. Stevens from the hospital and expressed my concern about the growing size of the account.

He told me then that Allied had just paid

a call in excess of a million dollars from the night before.

I made the statement that Allied would never miss any more than one margin call.

Then later when I was home I called Mr. Stevens again to express my continuing concern, and he said, "I'm going to take you off the Allied account. All I want you to do is send us your market letter that you send out every week."

Q Had you finished your answer?

A That's enough, yes.

Q Did you have any conversation with Mr. Stevens during October 1963 on the subject of scaleup margin?

A I believe in one of the conversations or a separate conversation he told me that the margins were -- had been increased effective November the 15th and that he was going to go down to the exchange to talk to Mr. Berg.

ought to start selling those positions?

elr1 Barton-direct [5454]

Q That was November 15, was it?

A The effective date of the escallated margin?

Q You said a moment ago that you told Mr. Stevens in October that Mr. DeAngelis or Allied would have to call only once. What didyou mean by that?

A I meant by that, once a firm fails to meet a margin call, it is failing to meet the margin call because it doesn't havethe funds, and if it doesn't have the funds to meet that margin call, it may not be able to meet other margin calls. Or it was a symptom that they were in serious financial trouble.

Q In October, 1963, while you were out ill dud you also talk about Mr. Glasgold?

A Yes, I did. He called me to tell me that the account was mushrooming greatly and it was on the basis of thatconversation that I called Mr. Stevens to express my continuing concern.

Q Did you tell Mr. Glasgold anything about reporting to Mr. Stevens at that time?

A No. It was on a prior conversation,sir, when I first entered the hospital, to be sure that he reported to Mr. Stevens.

Q With respect to Mr. Stevens, following your first telephone conversation with him while you were

elr Barton-direct [5455]

out sick did you call him again?

A Yes, I did.

THE COURT: We have got two calls now. Are you talking about a third call?

THE WITNESS: Yes, sir.

MR. O'DONNELL: Yes.

THE COURT: All right.

A Thinking about the escalated margin call that Haupt would have to meet on November 15, I thought that if I could get a short position on the books of Haupt, thereby reducing the net position, reducing also the ultimate call in money on thepart of the clearing house on Haupt on November 15, I asked Stevens' permission to get some short position on our books.

He said, "I am busy at the moment, go ahead and do what you want."

I had several conversations with Newman and with Mr. Gittleman. In one of these conversations I was given the name of Overworld by Mr. Gittleman

I then called Mr. Berg to tell him that we might take some business from Overworld on the short side to reduce my position, and I said can you give me any counsel.

He said all I ask is that you be sure that

elr Barton-direct 5460

Q To your knowledge, did he have Haupt's wire on the floor of the produce exchange?

A I think he availed himself of our private line to our booth on the floor of the produce exchange.

Q Did there come a time when you had any conversations concerning the possible ex-pitting of 2500 short contracts between Peters and Haupt?

A Yes. On Novermber 18 Peters called me and said, "I want those 2500 contracts back," and I had to ex-pit them to him.

Q What did you do first when you returned to Ira Haupt on November 11, 1963?

A I looked at the position, futures position of Allied, calculated the percentage relationship of the respective open interests, I looked at the loan accounts, I called Mr. STevens, I suggested that we freeze the account, added that it's probably too late, butwe ought to freeze it.

He answered "I can't do that now because Friday night when Glasgold was here I gave him permission, I gave Allied permission to add some 800 contracts to their current position."

Q If November 11 was Monday, that was the present Friday?

A November 8. And these figures are -- oh, were in Stevens' writing on Sy Glasgold's sheet that he picked up.

Q Did there come a time when the account was frozen?

A On the following Wednesday.

Q That would be Wednesday, November 13, is that right?

A 13, right.

Q Did you reject any contracts long in the Allied account after November 13?

A I did. I believe it was Thursday, or possibly a day after, it was late in the afternoon, someone called me and said they want to give us some 500 contracts from the floor of the produec exchange. I said I don't want them.

Q That was somebody from Allied calling, right?

A It probably was. I don't know who.

Q Why was the account frozen and why did you not accept those contracts?

A I asked that the account be frozen and on that basis, I didnot accept it.

Q Why did you ask that the account be frozen?

elr Barton-direct 5462

A It already was too large in relationship to the total open interest, and too large by itself.

Q Can you give us some approximate idea of what the taking on of 800 contracts long would have done to the exposure, how much it would have increased the exposure?

A 800 contracts over --

MR. KIRSCH: Excuse me. Could we also have what he means by exposure?

THE COURT: What I would like, Mr. O'Donnell, is for him to tell us what his computations were when he came back of Allied's position in terms of the open interest; does he know?

Q When you came back on November 11 and looked at the position of the Allied account in Haupt with respect to cottonseed oil futures did you make any computation as to what percentage of the open interest that was?

A I did.

Q What did that tell you?

A About 90 per cent.

Q Did you keep that information to yourself at that time, at least within the Haupt organization?

A I most certainly did.

THE COURT: I assume you told Mr. Stevens.

THE WITNESS: Oh, yes, sir.

MR. O'DONNELL: My questions of course were just outside the Haupt organization.

Q Did you send any margin call out to Allied following your return on November 11, 1963, namely on November 14th?

A November 14th we sent out a call for $1,100,000-- I may be of $20 or $30.

Q Would you like me to put that calendar up where you can see it?

A Thank you.

(Pause.)

Q I'm not clear. Did you say that you did send out a margin call to Allied on November 14th?

A Yes, sir, for $1,100,000. It might be a few dollars more, maybe $52, I don't know, I'm not too sure.

Q Was that margin call met, sir?

A It was met by the submission to us of three checks on Friday afternoon. The moment I received those three checks I called Mr. Stevens and said there is something wrong. Instead of sending us a wire transfer, they have sent us three checks totalling one million one, and then I sent the checks up to

Mr. Stevens' office.

Q What did you mean when you said there was something wrong, or you told Mr. Stevens there was something wrong? What did you mean?

MR. KIRSCH: Could we just have what he told Mr. Stevens and not necessarily what he might have thought to him.

THE COURT: All right. What you told Mr. Stevens.

A I told Mr. Stevens there is something wrong, and something wrong in the sense, sir, that they had been sending us a wire remittance, and this time it was in the form of a check.

Q Did Mr. Stevens say anything to you about what he would do, if anything, concerning that subject?

A Not then. But later I called Mr. Stevens and asked for instructions as to what I should do, Monday morning. I assumed that the receipt by us of these three checks meant that Allied was probably in financial trouble. He said no, don't do anything.

He said, Mr. Newman and I are going to talk to Allied Crude Vegetable Oil tomorrow morning, Saturday morning, the 16th.

He said, you have been ill, you go on home,

and come in Monday morning.

Q Did you ask Mr. Stevens during your conversation with him that if he wanted you to start selling Allied out on November 18th?

A I asked him that on the morning of the 18th, sir.

Q What did he say?

A He said no, just keep me posted. So at the time I made a computation that a one cent variation in the price of oil meant a loss to us or to DeAngelis of nine million dollars, and I said I will call you every 15 minutes or every two and a quarter million dollar fluctuation, 25 point fluctuation, whichever comes first.

Q Let me show you Xerox copies of three checks which have been marked as Defendant's Exhibits 19 for identification and ask you if you recognize those as the checks to which you have been referring as the three checks received from Allied pursuant to the margin call.

(Pause.)

A I recognize them, sir, as being a facsimile of the three checks we received.

Q And you have had a chance just now to total the amounts of those three checks and they come

out to $1,151,000, is that correct?

A That is correct.

MR. O'DONNELL: I offer these in evidence.

MR. KIRSCH: I have no objection. Again defendants some time agao asked if we could find them, we would produce the originals. Again, the bottom parts, through age, you make it rather difficult.

MR. O'DONNELL: I will accept that. May I call these to the attention of the jury.

THE COURT: Yes.

MR. O'DONNELL: These checks are each dated November 15, 1963. They are on the printed logo, Allied Crude Vegetable Oil Refining Corporation; they are made payable to the order of Ira Haupt & Company in each case, and in ea[illegible] case the remittance statement says Re: margin, with the amount of the checks.

The checks are in the amount of $350,000, $350,000, and $451,000, which I believe totals $1,151,000. Those are signed by Allied Crude made payable to the order of Ira Haupt & Company.

(Defendant's Exhibit 19 received in evidence.)

xx Q Did you say, sir, that you sent the checks upstairs to Mr. Stevens?

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5474

AFTERNOON SESSION

2:00 p.m.

(In open court, jury present.)

F R E D B A R T O N, resumed the stand and testified further as follows:

MR O'DONNELL: May I proceed, your Honor?

Your Honor, during the noon recess we have substituted as Defendant's Exhibit 19 the original three checks and the attached remittance statements or stubs.

All three of these checks, of course, are the ones that total $1,151,000 made payable by Allied to the order of Ira Haupt drawn on the First National Bank of North Bergen, New Jersey, and it is undisputed, your Honor, by the attorneys for the plaintiffs and the defendants that these three checks in that amount have never been cashed. I believe it is undisputed they were in the possession of Ira Haupt from November 15, 1963 on until sometime in early 1964 when they were discovered. That is all I think we have to do at this time.

THE COURT: Fine.

MR. O'DONNELL: There is further evidence on that that we don't have to go into with Mr. Barton.

lots of others.

MR. O'DONNELL: I didn't say lots of others, possibly others.

MR. KIRSCH: I'm sorry. I misheard.

A Distribution was limited mostly to Haupt personnel, customers.

Q As you wrote that particular market letter for the close of the market on November 14th, did you discuss what you were writing for that particular issue with others at Haupt?

A No, sir.

THE COURT: What is the answer, Mr. Barton?

THE WITNESS: No, sir.

Q Do you recall what you wrote in that article on November 15th?

A I do. I recommended that wheat, soybeans, cottonseed oil and soybean oil should be sold on the basis of my own analysis.

Q After you had written the article did you discuss it with anybody?

A Mr. Stevens.

Q Will you tell us about your discussion with Mr. Stevens and when it was?

A He asked me, "Assuming you are right, how

far down do you think the market will go?"

I answered, "Two to two and a half cents provided Tino can meet his margin calls."

Q Will you tell us what you recall happening on that day?

THE COURT: When is this?

MR. O'DONNELL: Monday, November 18, 1963.

A Before the market opened I asked Stevens for instructions about selling or whatever he wanted me to do.

He said, "Do nothing. Keep me posted."

Q Selling what, sir?

A Liquidating the position which it had become our right to do so because he hadn't met his margin calls.

Q That is of course DeAngelis and the Allied position?

A Correct.

Q What did Mr. Stevens say?

A He said no, don't do anything, just keep me posted. So knowing that 1 cent fluctuation meant a loss to us of $9 million, 1/4 of a cent would be $2-1/4 million, so I told him I would keep him posted every 15 minutes or every change of $2-1/4 million, whichever came first, which I did.

During the day we received calls from the produce exchange and from our clearing brokers in

elr Barton-direct 5484

(Defendants' Exhibit 82 was received in evidence)

MR. O'DONNELL: May I read this to the jury.

(Mr. O'Donnell read tothe jury from Defendant's Exhibit 82 in evidence)

Q With respect to this ex-pit transaction represented by Defendants' Exhibit 82 in evidence did that transfer increase the net long position of Ira Haupt on November 18, 1963, sir?

A By 2510 contracts.

Q Did you have any conversation with Mr. Stevens about this transfer and that increase in the net long position before it was done, sir?

A (No response)

Q Did you get his approval for it?

A His approval wasn't required because it is entrely in Mr. Peters' discretion as to whether he wants to leave it with us or take it back.

Q Did you check with Mr. Stevens at all with respect to this, do you recall, on November 18?

A I don't remember, sir. So many things happened that day.

Q Did you at any time on November 18, Monday,

ought to start selling those positions?

A No.

Q On the 18th did anyone at Ira Haupt to your knowledge go over to Allied to get any more margin or collateral or security for the position that Allied had with Ira Haupt?

A Newman went there.

Q Do you remember who sent him there? Was that Mr. Stevens?

A Stevens sent him there.

Q Did Allied furnish Mr. Newman with any kind of security?

A With a warehouse receipt for 60 million pounds of cottonseed oil.

Q Was that in the form of a field warehouse receipt, sir?

A It was a field warehouse receipt.

Q Not a New York Produce Exchange registered receipt?

A No, sir.

Q Was thatfor 60 million pounds of oil, do you recall?

A It was.

Q Do you recall what the approximate value of

that was on that day?

A (No response)

Q Is that $5 million or more?

A The figure in mind is 5 million 4.

Q Were those warehouse receipts that Mr. Newman got from Allied on November 18, 1963 good ones?

A Later it was proved that they were not good.

Q Proved to be forgeries as of that day, were they not?

A As of that day, yes.

Q Did you have a meeting or any meetings at Ira Haupt on the evening of November 18, 1963?

A Yes. I was working with Mr. Stevensin the compilation of our assets inthe form of warehouse receipts and export documents, and on the basis of those documents we were solvent.

Q Ira Haupt was solvent?

A We did not question the validity of the warehouse receipts.

Q Did Mr. Stevens ask you to prepare a complete summary of the Allied account at that time?

A Yes, I did.

Q Do you remember what that summary showed as to Allied's debts or debits to Ira Haupt & Company?

A I don't remember what the compilation showed. I remember the total loss.

Q What was that, sir?

A 18 million dollars.

Q With respect to the loans, were the 10 million dollars in export loans and the three million dollars in product loans still outstanding?

A They were still outstanding, which made a total of 31 million dollars.

THE COURT: I don't understand what you mean by the loss. This is on the 18?

THE WITNESS: The total loss on the final liquidation.

THE COURT: You mean the final liquidation?

THE WITNESS: Yes, sir.

THE COURT: I'm sorry. The question was about position compilation on the 18th.

Q On the 18 there was a compilation of the 10 million dollars and the three million dollar loans, is

that correct, that you made for Mr. Stevens?

A (No response.)

Q What was the compilation that you were making for Mr. Stevens on the evening of the 18th?

A We took the value of the collateral at the market price of that night and the amount of money we owed, that Allied owed us, and the collateral was in excess -- the valued collateral was in excess of the amount of money that Allied owed us.

Q That is why Ira Haupt, you believed was solvent as of the 18th?

A That is correct.

Q Were there any additional margin calls made on November 18th of Allied, to your knowledge?

A Yes, sir. The market had gone down a little more than a cent and I think that the additional margin call was in the amount of nine million dollars; in addition to the 15th and the 14th.

Q Was Mr. Stevens informed of that fact, sir, that that margin call was made?

A He certainly was.

Q Was Mr. Brenner a partner of Ira Haupt at this time in November of 1963?

A He was at that time.

elr Barton-cross 5508

Q You also testified that when Haupt made the first export loan to Allied in May, 1963 it received certain documents, including a field warehouse receipt, is that right?

A That is correct.

Q Were those the same documents that Haupt delivered to the Chase Bank in connection with the loan that Haupt obtained from that bank?

A Those would be the same documents.

Q And the warehouse receipt was made out to the Chase Manhattan Bank for the account of Ira Haupt & Company?

A Into correspondence with the letter of intent.

Q When you spoke of this broad margin, it's a fact, is it not, that under the rules of the exchange as you undrestood them at the time, Haupt was not required to obtain any original margin from Allied, is that correct?

A That's correct.

Q And in fact, it received $300 in cash and $100 in produce for each conduct, is that right?

A Yes.

Q When you say $100 in product, actually, the base value of the warehouse receipt would be $143,

wouldn't it?

A Right.

Q So you always had that 30 per cent margin of safety, if you will?

A That is correct.

Q Did Haupt ever take produce margin for variation margin payments from Allied?

A No.

Q That was always cash?

A That was always cash.

THE COURT: What was that question?

MR. KIRSCH: Did Haupt ever make product margin or variation margin. In other words, did it ever take a warehouse receipt as payment for variation margin from Allied.

THE COURT: Now I get the question. Sorry.

MR. LIMAN: Do you mean other than on November 18?

THE COURT: No. Now I understand. You said did they take product margin as variation margin.

MR. KIRSCH: Right.

THE COURT: I thought you said product margin and variation margin.

MR. KIRSCH: I'm sorry. The answer was

you talked to Mr. Berg did you tell him the name of the customer, Allied?

A I don't remember specifically. I may have told him, but I'm not sure.

MR. O'DONNELL: Your Honor, it's in the letter, I believe. Here's Defendants' Exhibit 35, and the witness has testified that he sent the Allied letter with the Ira Haupt letter.

THE WITNESS: Sir, is that the 6B or 6A?

Q 6A.

MR. O'DONNELL: No, that is the 6B ex-pit.

MR. KIRSCH: I'm sorry. I was asking about the 6A.

MR. LIMAN: He asked him about the office transfer.

MR. O'DONNELL: I'm sorry.

MR. KIRSCH: I'll use this one too.

Q Did you discuss with Mr. Berg or say anything to Mr. Berg about your concern over a potential squeeze?

A I did.

Q What did you say to him about a squeeze?

A I told Mr. Berg that insofar as the bulk of these contracts coming over to us were October contracts, that I would ask Mr. DeAngelis to furnish a letter guaranteeing that he would not take delivery.

Q Did Mr. Berg say anything about being concerned or anything about a suqeeze,in return?

A No.

Q He just said, "Yes, that is fine."

A That's right.

Q Was Mr. Kamerman present during this conversation?

A Mr. Kamerman was present. The conversation took place in Mr. Stevens' office after I had discussed with Stevens, after he had revealed to me what the nature of the transfer was to have been.

THE COURT: You know, Mr. Kirsch, that you are reading the basis of your objection to the conversation he had with Mr. Berg at a later date, in his testimony.

MR. KIRSCH: I don't think the conversation he had with Mr. Berg at a later date relates at all to these conversations, your Honor.

THE COURT: I know they don't, but -- I'm sure they don't, but if you can get them in, I'm sure the

elrf 4 Barton-cross [551]

MR. KIRSCH: If there is no objection to 266, I would like to put in the September 30th letter and attachments.

(Pause.)

MR. LIMAN: No objection to September 30th.

MR. MINNEROP: No objection.

(Plaintiff's Exhibit 266 received in evidence.)

THE WITNESS: Mr. Kirsch, may I amend my last answer to include the statement that if I asked for a guarantee, I must have told Mr. Berg that it was Allied, all right?

Q Fine. Do you remember whether you told him anything else besides being Allied and that you were concerned about a squeeze?

A Not that I was concerned about a squeeze, but that I wanted to prevent a possible squeeze.

MR. KIRSCH: At this time, your Honor, I would like to read into the record the letters.

THE COURT: All right.

(Mr. Kirsch read to the jury from Plaintiff's Exhibit 263 in evidence.)

MR. KIRSCH: I would like to read the November 13th letter.

(Mr. Kirsch read to the jury from Plaintiff's Exhibit 264 in evidence.)

Q When you talked to Mr. Berg, as you testified on direct examination, approximately September 25th or 26th, with respect to the ex-pit of 2,454 October cottonseed oil contracts in the liquidation, did you during that telephone conversation refer to Allied again?

A Yes, I did.

Q What did you say about Allied specifically to Mr. Berg?

A That he wanted to liquidate his -- a portion of his October position through the medium of a 6-B transaction involving warehouse receipts. Being somewhat unfamiliar with the requirements --

Q You say somewhat unfamiliar.

Had you ever done a 6-B ex-pit before?

A No.

Q Continue, please.

A I asked him what documents I should obtain.

He told me the contract, the description of all the numbers of the warehouse receipts. That is all that was required.

Q You told him you would get that information and send it to the Secretary; is that correct?

A We got that information and we sent it to the Secretary.

Q He said that was acceptable?

A He told me -- he didn't reply -- let me put it this way. He didn't tell me that after the receipt of the documents that they were acceptable. He told me that those are the documents I should get.

Q Was Mr. Kamerman present when you made that call to Mr. Berg on September 25th or 26th?

A Yes, he was present.

Q Did you repeat out loud to Mr. Kamerman and Mr. Stevens what Mr. Berg's responses were to your questions?

A I didn't repeat to them, but I repeated to

Berg to be sure that they heard what I said.

Q When you say to be sure that they heard what you said, you mean to be sure that Mr. Kamerman and Mr. Stevens heard?

A That is correct.

Q Turning to this conversation that you testified to on direct that you had with Mr. Berg in October concerning Overworld Trading.

Do you recall that?

A I do.

Q Did you call Mr. Berg?

A I called Mr. Berg.

Q Exactly what did you say to him, as best you can remember?

A In substance I would have said that I wanted to get some short positions on our books to reduce our net long position.

Q Did you tell him what your net long position was?

A I did not.

Q Did you mention the word Allied to him?

A Whether I did or not is immaterial because I mentioned to him that I received the name of Overworld, and he said, "Be sure that there are no interlocking

conditions between Overworld and Allied."

Q So he used the word Allied when you referred to your long position? When you referred to Haupt's long position, Mr. Berg responded with the word Allied, is that right?

A I think he knew that Overworld and Allied were in the same complex.

Q In any of these three conversations with Mr. Berg that you have testified to, Mr. Barton, did he tell you that the Clearing Association had expressed concern to him over the increasing concentration of contracts in the hands of a relatively few clearing members?

A You are now referring to my conversatins with Mr. Berg during the month of October?

Q During the month of September or October, any of those three that you testified about.

A The answer is no.

Q Did he say that he had been told by the Clearing Association that large offsetting positions are established by apparently affiliated interests through the medium of ex-pit transactions and are often liquidated by the same method? Did he tell you that in substance?

A I must answer no to that question, too.

gwrf 4 Barton-cross 5520

Q Did he tell you that the Clearing Association had stated that it believed the situation to be unhealthy and was concerned that the position of the Exchange and of the Clearing Association might be jeopardized?

A Not in any conversations during September or October.

Q Did he tell you any of those things in any conversation that you had with him prior to November 20th?

A No,sir.

Q Did Mr. Berg tell you in any of these conversations that he had talked to Mr. DeAngelis and that Mr. DeAngelis had promised to reduce his position?

A No, sir.

Q Going back now to the beginning of the taking on of the Allied account in the spring of 1963.

Was the proposal that was accepted in May 1963 substantially different in your opinion from the proposal that was rejected in 1962?

MR. O'DONNELL: Objection, your Honor, to relevance.

MR. KIRSCH: He went into this, your Honor, on direct as to how they turned down the deal

Q So far as you knew, Mr. Barton, prior to November 20th and the close-out, did you or, to the best of your knowledge, any partner or employee of Ira Haupt & Company have any knowledge that any of the warehouse receipts or forward sales contracts that Haupt received from Allied were in any way forged or counterfeited?

A If the fact of forgery was established after the 20th, the answer is no one knew.

Q And certainly you did not?

A I didn't know.

Q To the best of your knowledge, you and no partner or employee of Ira Haupt & Company believed or had any reason to believe there was no oil in the tank farms at Bayonne, New Jersey, did you?

A No.

MR. KIRSCH: May I just confer for a moment, your Honor?

(Pause.)

MR. KIRSCH: I have no further questions.

MR. O'DONNELL: May I proceed, your Honor?

THE COURT: Yes.

gwrf 2 Barton-redirect 5524

REDIRECT EXAMINATION

BY MR. O'DONNELL:

Q With respect to the letters from Allied that were obtained by Haupt with respect to the guarantee that Allied would not take delivery, Mr. Barton, did you tell Mr. Berg that the point of that letter was to protect against the possibility of the squeeze that you thought might otherwise be possible?

A That was the motivating reason for suggesting we get a letter, non-receipt.

Q Also you have said that you did not know and, to the best of your knowledge, nobody at Haupt knew that any of the warehouse receipts or I guess I can include export contracts as well that Allied had were forged prior to November 20, 1963.

But is it also fair to say that neither you nor, to the best of your knowledge, anybody else at Haupt ever checked in any way to see whether there were any warehouse receipts that were forged or export contracts that were forged?

MR. KIRSCH: Objection, your Honor. I think there has been testimony as to what they did and how they received them, passed them on.

THE COURT: The objection is overruled.

elrf 4 [5580]

their role in the report. This will bring in an entire side issue which will put the CEA on trial rather than the defendants.

THE COURT: I don't know how far we can go with it. I'm not going to allow any analysis of the CEA or side issue on that, but it does appear to me that one of the facts that a jury is entitled to have, we all analyze from the perspective of removal, I think the fact that the -- the defendants are entitled to have the jury consider as one of the facts if it makes a determination on this matter, is what the CEA, that had responsibility for enforcing the Act, felt in this record, if this is an official document.

MR. HARRIS: I may also add that we believe there is evidence in the document itself that casts some doubt to the truth worthiness of this document, which is a factor mentioned in the rules. This document wasn't widely distributed, it has got code numbers on it, there is a list of who got it and these are crossed out.

The copy I eventually saw was No. 215, which was starting at 200. So obviously it wasn't widely distributed. I think we are entitled to have whoever authored this document. It is not clear from the

gwrf 4 [558]

Produce Exchange. Maybe the Produce Exchange would have agreed with him. We could obviously cross examine him about it.

MR. HARRIS: Your Honor, may I hand up the outline of the testimony of Mr. Raclin that I have given to all the defense counsel last week.

There is nothing in that outline about the matters they are talking about.

MR. LIMAN: What he observed himself. You say what did somebody observe himself. Then you get into the question of what did he do with this knowledge.

He should have brought it to the attention of his board. He probably should have brought it to th attention of the Produce Exchange, but he didn't.

MR. HARRIS: That is not what Mr. Raclin is being called to testify about.

MR. LIMAN: As long as we understand.

MR. HARRIS: I thought we did.

MR. LIMAN: I wasn't sure from that outline.

THE COURT: All right. Bring in the jury.

Before the jury comesin, I have your memorandum, Mr. Harris. I also have the affidavit of Mr. Caldwell. This was testimony in 1965. This is in regard to this investigation. He indicates that the

gwrf 5

5590

investigation was made under his supervision and other responsible officials in the Commodity Exchange Authority, that the information was analyzed and developed and on the basis of this they reached certain conclusions.

The only reason as I can understand it that I would have for not admitting this is if I found that it was unrelabile. It is a governmental report. Is not a part of the case, I gather, because the defendants have cut down their investigation, but you have a copy of it. It is Mr. Caldwell's --

MR. HARRIS: It is the same problem, your Honor. It is an out of court statement bysomebody in another proceeding. We can't cross examine Mr. Caldwell.

How can we determine how reliable his report is if we can't ask Mr. Caldwell or his staff?

MR. BERNFELD: Your Honor, may I speak to this problem?

The problem is a different one. When we requested the documents from the Commodity Exchange Authority in this other action, among the documents requested was included a report of investigation. We had a very broad request which would have included such report. No such report was produced.

I have no way of knowing whether the

gwrf 6 [5591]

statement of Mr. Caldwell's affidavit bears any relation to this report, your Honor.

THE COURT: He says he is talking about the report.

MR. BERNFELD: In that case this document was suppressed by Mr. Caldwell --

THE COURT: That is not the problem.

gr4 [5595]

here.

THE COURT: That's the thing for you to meet. Call the jury in. I have Caldwell's affidavit.

MR. BERNFELD: I would like to point out, your Honor, that the following three points: your Honor has ruled during the course of this trial that data that was unavilable to the regulators of the board of managers has been a basis to exclude plaintiff's exhibits. There is much date in here that was unavailable in the normal course of the board of managers.

Secondly, the document is replete with charts and graphs which I believe are no different --

THE COURT: The only thing that the defendants want it in for is that they made an investigation and conclusions. If you would redact it, I'm sure they would probably like that better.

MR. BERNFELD: There's a third problem with it, your Honor. The entire report integrates soybean oil, peanut oil, lard and a variety of other commodities in reaching the conclusions.

Your Honor has ruled, and we have tried to go into these subjects, that they have been inadmissible.

I don't believe that we can segregate this out without having an opportunity to cross-examine

hpr Raclin-direct 5598

DIRECT EXAMINATION

BY MR. HARRIS:

Q Mr. Raclin, how are you currently employed?

A At the present time I'm a senior vice president of Paine, Webber, Jackson & Curtis in charge of their commodities, national commodities, and director of the firm.

Q What is the business of Paine, Webber, Jackson, sir?

A Investment bankers, stockbrokers, commodity brokers, active in government, municipal agency, equities and debt.

Q Where are their offices located?

A Their headquarters are 140 Broadway. They have 120 offices in the United States, six or seven offices abroad, ranging from Tokyo to Geneva, Lugano, Europe.

Q Where is your office located?

A 288 South LaSalle, Chicago, Illinois.

Q For how many years have you been in the commodity and commodity futures business, sir?

A Formally since I got out of the marine corps in 1946.

Q What academic degree do you hold?

A I hold a BA, Dartmouth College, 1940.

Q Can you just briefly trace your business career after you got out of college, sir?

A From 1946 to 1952, I was an employee, a partner, a vice president, as the form charnges of my father's brokerage firm which was a cash vegetable oil brokerage firm.

The next two years I was a vice president and director of World Commerce Corporation, which was an international corporation which chairman was Edward Stetinius, previously Secretary of State.

I then became for 11 years a general partner of Bache & Company, who are in identical business with Paine Webber, andin the last ten years I had been a partner of and later vice preisdnet and then senior vice president of Paine, Webber, Jackson, Curtis.

Q In your experience in the commodities business, have you dealt with vegetable oils?

A I have been a cash vegetable oil broker in vegetable oils and substituteds.

I have been a futures broker.

I would gather I would be considered one of the most active in the country.

Q In vegetable oils?

A Yes.

Q Does that include cottonseed oil, sir?

A I have traded as a broker in cottonseed oil, cash and futures, yes, for customer accounts.

Q Do you have any personal experience inthe operations of and the regulation of commodity markets?

A Yes. In the course of business I have been a director of the Chicago Board of Trade, I have been a director of the Chicago Mercantile, I have been president of the association of commodity brokers, I have while on the board of trade been involved in their various committees, the cottonseed oil committee, arbitration committee, clearing house committee, I have been a governor of Chicago Board Clearing Corporation -- do you want the security side?

Q You mentioned a clearing corporation.

A Yes,

Q Is that the clearing house that works with the Chicago Board of Trade?

A All trades of the various commission member firms of the Chicago Board of Trade clear their trades through the Chicago Board of Clearing House and are stockholders therein and mutually responsible therein.

Q In addition to your practical experience have you done any lecturing in the field of commodity futures market?

A Yes, I've been invited on two occasions to address the International Oil Seeds Congress which is held normally in a different city, normally in Europe but last year for example in Abidjan, Africa. I have been invited and lectured at Harvard University, Minnesota, Wisconsin, Michigan State, Purdue and on occasion other places.

Q Are you familiar with the manner in which commodity exchanges operated during 1963?

A Yes, I at that time was a director of the Chicago Board of Trade and a Governor of the Clearing Corporation, simultaneously.

Q Are you familiar with the futures markets on which vegetable oil futures were traded during 1963?

A Yes, I was very active in the trading of those in 1963.

Q Just in a general sense, what were your duties as a director of the Chicago Board of Trade in 1963?

A Well, the duties of a director --

MR. O'DONNELL: I object to this, your Honor.

I don't see what the duties of a director of the Chicago Board of Trade has to do with this case.

MR. LIMAN: He asked him what his duties were. That is what the question was.

MR. O'DONNELL: I object to that on the ground of relevancy.

THE COURT: I think it is background to get the measure of his experience.

A When I became a director of the Chicago Board of Trade the first thing I had to do was read carefully and endeavor to understand to the best of my ability the rules and regulations. Then it became a requirement that any governor or any director had to see that the present rules on the books were fairly and equitably enforced via the structure of the Exchange, and to see that if it was necessary, that new rules be introduced to meet new conditions that might have to be changed in an equitable and fair manner to all participants of the Exchange regardless of what they did.

There are various components of the industry of course.

Q Were you generally familiar with the manner in which the New York Produce Exchange operated during 1963?

A Yes. I had customers who had positions on the New York Produce Exchange and I executed orders in behalf of those customers. I was familiar with it.

Q Prior to coming here today, Mr. Raclin, have you obtained in more detail familiarity with the regulatory structure and responsibilities of the directors of the New York Produce Exchange in 1963?

A I have obtained and have read on several occasions the rules and regulations, a copy of the bylaws, copy of the rules for cottonseed oil trading, three different documents and I have them with me.

Q Are you able to compare the functions and duties of directors of the New York Produce Exchange in 1963 with those of the Chicago Board of Trade in 1963?

MR. LIMAN: I would object to that.

THE COURT: Sustained.

Q Based on the study you have indicated you have made prior to coming here today, can you describe in general what the duties were of the directors of the New York Produce Exchange in 1963?

MR. LIMAN: Objection, your Honor. That is a question for your Honor to define for the jury.

THE COURT: Sustained.

Q Is service on the Board of Directors a

markets and within certain limitations all of the commodities markets operated under that law.

MR. LIMAN: The word "required" your Honor -- if he wants to ask a question to establish whether he is familiar, which he probably is, with customs and what they customarily look at, but to say "requirement", that is your Honor's function.

THE COURT: It seems to me that is what you have to do and I assume that it is what you intend to do to try to find out whether or not there was a custom and usage and he can tell us that, with respect to operations in the commodities futures market.

MR. HARRIS: I will rephrase the question, your Honor.

Q Mr. Raclin, what were some of the market indicators, if any, that members of the Board of Governors, or Board of Directors of the commodities markets customarily observed and looked at during 1963?

MR. LIMAN: Same objection on lack of foundation.

MR. HARRIS: I will ask if there was a general custom, your Honor.

MR. O'DONNELL: I object to this. How could he possibly know what the general customs were of --

supply and demand situation.

Another one might be the volume of ex-pit transactions.

Another one might be the Government reports of long and short traders that would show the shift of ownership going on which might require further action after further investigation.

Some of the things after investigation would require no action.

Q Would you include the number of deliveries taking place on the exchanges as one of the factors it was customary for directors to look at.

MR. LIMAN: Objection as leading, your Honor.

THE COURT: Objection sustained.

Quite frankly, Mr. Harris, I don't think you have established that Mr. Raclin is in a position to testify about custom and usage in the first place. I don't think that has been established at all.

I don't know why the defendants don't object but maybe they were waiting.

Q You indicated earlier that you have been connected with more than one commodities market, is that right?

A Yes. I have been a member of the Winnipeg

Grain Exchange, Kansas City Board of Trade, Minneapolis Grain Exchange and the Chicago Board of Trade. Four exchanges. I have served on some committees of those other exchanges.

the SEC Act as much as you can.

Q In your experience in the commodities business have you reached any conclusions as to whether commodities markets say in the United States operate in similar fashion to one another or operate differently?

A Generally speaking --

MR. O'DONNELL: That is just a yes or no, isn't it, your Honor? The question calls for just a yes or no answer.

THE COURT: I am not sure of that. I am not sure that can be answered yes or no. He can answer it yes or no. I'm sure that is going to require some explanation.

MR. O'DONNELL: I object to this question on the grounds of lack of foundation.

THE COURT: That objection is overruled.

A Generally speaking, they are all auction markets. So in general principle, they all operate that way, with buyers and sellers meeting and arranging trades by auctions.

But to various degrees in minor areas the customs are different on each exchange. There is a discrepancy difference in each exchange. They are not identical.

gr9 Raclin-direct [5623]

Q Do you remember whether it was after the debacle?

A I don't know.

Q You don't know whether it was after 1963?

A No.

Q As I understand your testimony, you have been a member of the board of only one regulated commodities exchange and that's the Chicago Board of Trade; am I correct?

A That is correct.

Q You said right at the beginning that in giving your background as a director of that exchange that you saw your responsibility as seeing to it that rules were fairly enforced via the structure of the exchange.

Do you remember that?

A That is correct.

Q By the structure you are talking about the staff and committee system of the exchange; am I correct?

A That is correct.

Q Is it a fact that while various exchanges may have committees that have the same or similar names, you are aware of the way in which those committees operate,

vary from exchange to exchange?

A They certainly do.

Q Have you ever attended a meeting of the board of directors of the New York Produce Exchange?

A No, sir.

Q Have you ever attended a meeting of a board of the Winnipeg Exchange?

A Yes, sir.

Q You have attended how many meetings of the Winnipeg Exchange?

A One.

Q Were you there as a consultant on a special subject?

A No, sir. As I remember it, they were contemplating a new futures contract and wanted to get the opinion of the various commission houses, whether or not we thought it would be successful, and they were asking for testimony.

your Honor, so I don't think there is any use in repeating it.

I will move to another subject area.

MR. O'DONNELL: If he is not qualified I don't see how he can move to another subject, your Honor.

THE COURT: He is not qualified to testify as to custom and usage. I don't know where he is going now. I have to wait for the question.

DIRECT EXAMINATION CONTINUED

BY MR. HARRIS:

Q Mr. Raclin, have you as part of your duties in 1963 in the commodities business, did you keep abreast of market conditions in the vegetable oil futures markets?

A Yes. Vegetable oils are interchangeable, and vary as to price differentials as to supply and demand.

If you are a soybean futures broker in Chicago you must know the value of peanut oil, lard, choice white grease, cottonseed oil, linseed oil, sunflower oil, rapeseed oil, walnut seed oil. You have to know the whole competitive structure spectrum if you are talking about vegetable oils to be able to do your

job.

MR. LIMAN: I'm sorry, your Honor, was it -- what kind --

THE WITNESS: Walnut seed oil, an exotic oil. There are lots of oils.

Otosica.

Q In the course of your duties in 1963, did you keep abreast of conditions in the cottonseed oil?

A Yes I had to, for the simple reason that as always, there is a price differential cottonseed is worth. A contract in New York is a delivered, refined contract and it must be compared with what the value of cottonseed oil is. If --

MR. O'DONNELL: I don't think this is responsive to the question, your Honor. The question is whether he kept abreast of cottonseed futures. I don't think we need a speech with each answer.

THE COURT: I don't believe that Mr. Raclin, who may be more qualified to give an opinion of cotton seed oil, because he has been in the market, but I don't think his opinion in regard to the matter is going to be any value to us at this time.

MR. HARRIS: I think Mr. Raclin is more qualified because he has personal experience both as a

hpr Raclin-direct 5636

director and active participant in commodities and vegetably oils than probably the experts who testified on both sides. He is capable of discussing what a manipulation is and what activities took place in 1963 and --

THE COURT: He is going to testify as to --

MR. HARRIS: He is capable of drawing conclusions based on the facts he kept himself apprised of what was going on. He has some knowledge of the great salad oil swindle and I think I am entitled to show him the exhibits and the facts that this existed on the produce exchange and if he thinks that it was a healthy market or if the market was manipulated or not, and go through the ex-pit transactions.

He does this for a living for 30 years, your Honor.

MR. O'DONNELL: For his living, your Honor, he didn't do anything with respect to the produce exchange in 1963. The records so show.

MR. HARRIS: Neither did Henry ARthur, or Roger Gray or Reynold Dahl.

THE COURT: The difference between Dr. Arthur, Gray and Dahl was the fact that they

had studied the whole subject and made a study of it all their life, their life's work and they were giving us something in regard to it. This man has worked in Chicago and he says the way these various exchanges operate, he testified they are different and there are differences in regard to it.

I don't think if that's where you are going, he is qualified to give us any help.

MR. HARRIS: If you want me to go whether he is familiar with ex-pit trading, or familiar with how contracts -- I can go through that, your Honor. Rule 702 indicated you can have a witness qualified by knowledge, experience, education --

THE COURT: He has told us he has never traded on the New York Produce Exchange. He has been involved in Chicago where he has traded; he has given advice in London and Singapore but they're not the New York Produce Exchange. He has testified before a member of the board in Winnipeg.

But, he has not traded on the New York Exchange and he has indicated that they all operate differently. So, he is going to tell us from his experience in Chicago what his views are what should be in New York and I don't think --

MR. HARRIS: Your Honor, that is not what he said. He has testified --

THE COURT: That is what he said up to now.

MR. HARRIS: Your Honor, the transcript will speak for itself. He said there are some differences in the structure, the committee structures but the exchanges, one operates like the other.

THE COURT: That's not what I understood him to say.

MR. HARRIS: And it is the same statutory scheme and regulatory structure. He has also testified, your Honor, that he dealt in soybean oil and soybean oil and cottonseed oil are interchangeable, and his customer bought both and --

THE COURT: As I understand the market, when his customers bought cottonseed oil, it was done at the New York Exchange and he didn't have anything to do with it.

MR. HARRIS: Hddidn't go on the floor to trade but that does not infringe on his expertise as to what a transaction --

THE COURT: You can ask questions but if it elicits an opinion of what should or should not be done in New York, I don't think he is qualified to do it.

hpr Raclin-direct [5639]

DIRECT EXAMINATION CONTINUED

BY MR. HARRIS:

Q Let's talk about ex-pit trading, Mr. Raclin. Were you familiar with ex-pit trading?

A Yes.

Q Have you personally been involved in ex-pit trades?

MR. O'DONNELL: Objection, your Honor, unless specifidd where --

MR. HARRIS: He is entitled to say he is familiar with it and then --

MR. O'DONNELL: He said he is familiar with it.

MR. HARRIS: I asked whether he has personally been engaged in it.

Q Have you ever personally been involved in ex-pit trading?

A Yes, frequently.

Q In what commodities, sir?

A Soybean oil, soybean meal, wheat, corn, soybeans, cottonseed oil, Winnipeg grains, barley, I believe once or twice. I think that's it.

Q Is there a general custom and practice in the commodities business of the kind of ex-pit trades that

hprf 9 Raclin-direct 5649

Let me read your answers and see if it refreshes your recollection, pages 293 and 294.

"Q When you say this oil was not in deliverable position, do I understand that correctly to mean because the American Express warehouses were not registered warehouses on the exchanges?

"A And they were not federally inspected.

"Q So that oil in those tanks could not be delivered either on the Produce Exchange or Chicago Board of Trade?

"A I know they could not be delivered on the Chicago Board of Trade. I frankly am not aware of the Produce Exchange, didn't enter into it."

Do you remember giving those answers?

To tell you the truth I don't remember but I am sure I did.

Q And you were being frank when you gave that testimony in 1965, is that correct?

A Yes.

Q You have been given in the years, since, copies of the rules of the Produce Exchange to read in preparation for your testimony, is that correct?

A That is correct.

Q And your attention has specifically been

brought to the witness stand?

A Mr. O'Donnell, I have no correspondence from Bache & Company on anything.

THE COURT: All right. Let's take a recess.

(Jury absent.)

THE COURT: I repeat, Mr. Harris, I will not allow Mr. Raclin to testify about his opinions in regard to the New York Produce Exchange since I don't think he has shown sufficient familiarity with its operations

MR. HARRIS: Including ex-pits?

THE COURT: Including ex-pits.

MR. HARRIS: I respectfully disagree. I would like to make an offer of proof on that.

THE COURT: As I started to say earlier, his opinion is probably worth somewhat more than mine. In the context in which he is testifying with it, not very much. He is going to have an opinion about various things. It is a personal opinion that derives from his operation and functioning chiefly I gather from the Chicago Board of Trade which as far as I know is different -- I don't know how it functioned in '63. The testimony that Mr. Liman read in '65 of his, he wasn't familiar with how the New York Board of Trade operated or its rules or what was required in 1965 when

MR. HARRIS: From a man whose life has been in this business. It is not a question of getting my view or somebody else's who just casually knows about this.

MR. LIMAN: He is not the judge.

MR. HARRIS: He has had 30 years experience. He has studied this market as much as anybody.

THE COURT: I am not convinced that this is allowable. I'm not convinced that this is allowable. I tried to explain my position to you. I tried to indicate to you that the areas in which I thought it was allowable. Apparently he is not able to testify in that way. I just don't think that this is appropriate testimony.

(Recess.)

(In open court, jury absent.)

MR. HARRIS: I wanted to indicate to you, your Honor, what I thought Mr. Raclin will testify about as a way of qualifications now, not substance at this point.

I indicate to you what it is that I would go through with him now if we were to proceed in front of the jury.

First, Mr. Raclin will testify that he was

gwrf 8 Raclin-direct 5658

generally familiar in 1963 with the cottonseed oil trading on the New York Produce Exchange and that he did keep abreast of volume of trading, open interest, deliveries and some of the factors that existed because of his customers that he was handling as a broker in Chicago.

THE COURT: He kept abreast of it in New York?

MR. HARRIS: Of what the figures were, yes.

THE COURT: All right.

MR. HARRIS: Also he was familiar with the cottonseed oil trading rules as they existed during 1963 on the Produce Exchange. Again as a broker for customers he had to have some idea what they were trading in New York.

Secondly, I would have Mr. Raclin comment on the transcript reference that Mr. Lipton read because I think it gave a misleading impression, the answer did, that he wasn't familiar with the New York Produce Exchange. When you read the question and answer and Mr.Raclin has confirmed this, this is what he will testify -- when you read the question and answer, what he was saying was he was not familiar in '63 as to American Express warehouse receipts that were registered -- registered receipts on the New York Produce Exchange ie. American Express did not have any registered receipts

gwrf 9 Raclin-direct 5652

on the Chicago Board of Trade that he knew of. He didn't know what warehouses were registered and what warehouses were not registered on the New York Produce Exchange.

Third, he would testify that all contract markets during 1963 operated in the same manner and that the directors of contract markets had the same responsibilities and duties in 1963.

THE COURT: How is he going to testify about that?

MR. HARRIS: From his knowledge and experience.

THE COURT: I thought we have just been through that part.

MR. HARRIS: We have been through it. I just want to tell you what he could testify about. The statutory scheme covered all the contract markets and that the duties of directors are the same no matter which market you are on under that scheme. He was a director of a contract market in that year and he was familiar with what those duties were.

THE COURT: That has nothing to do with what the duties of a director are and it is very clear the issue in this case is whether the directors were negligent or there was a breach of faith in respect of their duty.

The question of that depends upon what was

going on in New York about the facts and their reactions to the facts.

MR. HARRIS: I was intending to show him, your Honor, the exhibits which show the warning signs and ask him, just as Mr. O'Donnell asked Mr. Arthur if he was sitting on the New York Produce Exchange Board in 1963 and he saw these warning signs, would he have thought they indicated an unhealthy market.

Mr. Arthur said in his view they didn't.

I expect Mr. Raclin to testify that they did, they would have to him had he been sitting as a director of the Produce Exchange.

Then I would ask him if these factors were shown to you as a director of the Produce Exchange in 1963, what would you have done. I think he is entitled to testify what he would have done.

THE COURT: I really have a lot of trouble with this. Maybe I'm more used to academics.

It seems to me that he is a trader, and obviously this is an experienced man. The breadth of his experience to me hasn't been shown. That was the reason that you tendered him, to make this kind of testimony in the first place. I indicated to you I didn't think he was qualified, that you had

gwrf 11 Raclin-direct 566

established his qualifications.

Now you come back and you want to do the same thing.

MR. HARRIS: I can only do what I feel that I can have the witness testify about. I'm not going to -- I appreciate your Honor's difficulties with this. I disagree with them. I didn't pick that line of questioning out of a hat. It is because that is the witness' experience. I could have him elaborate it at great end at what he did as a director of the Chicago Board of Trade. I don't think that is what you are asking.

gr1 5662

THE COURT: The problem I have with it, you are going to be subjected to a great deal of objections and I'm going to have to sustatin them.

MR. HARRIS: That's why I'm doing this now. I'm going ot make an offer of proof. If you are going to prevent him from testifying, there may be no point repeating everything. I think I would like to also say I think he can testify -- I think he's indicated that he's involved in ex-pit trading on all kinds of exchanges, including the New York Produce Exchange, and I think he's qualified to testify that he's never heard of ex-pits being used for financing prior to hearing about theDeAngelis affair, that ex-pit trades are customareily not used to roll forward positions as they were in this particular case that we are concerned about, and I think he's qualified to testify about manipulation. One of his duties on the Chicago Board of Trade in 1963 was to prevent manipulations, and he can testify as to what a manipulation is and I can ask him a hypothetical question as to the facts of this case regulating to registered warehouse receipt financing, and ask him if in his view that constitutes a manipulation.

I can ask him another hypothetical about

5663

gr2

buying at the close and ask him if in his view that's a manipulation. I can ask him about a man building up a 90 per cent position on the market and ask him if that's a manipulation.

Finally, your Honor --

THE COURT: All he's doing now, as I gather it, he's covering the same ground as Professor Dahl and Professor Gray. He's not covering it from the point of view of experience. He's covering it the same as they were.

MR. HARRIS: Your Honor, he's giving experience from a different light. They gave experience that they discerned through the course of reading and study. He's got experience --

THE COURT: If he's going to testify about manipulation, has he dealt with it? Has he operated in any situations in regard to it himself?

You are going to have him testify about his ideas.

MR. LIMAN: Can I --

MR. HARRIS: Let me finish. He was involved in this very situation, your Honor, when he sat on the Chicago Board of trade. He had dealings and he was involved with Mr. DeAngelis. He commented on this

gr3 5664

situation.

Finally I would point out in his experience -- I wasn't going to get into this at all, your Honor -- Mr. Raclin's name was tendered by several senators to the president as a possible candidate to be on the new Commodities Futures Trading Commission. At least several people in the United States Senate felt that he was expert enough to be involved in regulation of this industry.

THE COURT: During the course of this trial I'm sure some of you are going to have some views that some of the presidential nominees in the senate aren't too good anyway. That doesn't impress me.

MR. LIMAN: Your Honor, let's make the record clear, since Mr. Harris is trying to make one, that he's tendered him as an expert, one, on customs of directors, and he clearly can't testify as to that.

Secondly, he's tried to qualify him as an expert on legitimacy of ex-pits for financing in the New York Produce Exchange, and he can't testify as to that.

In any event, your Honor, the statement that was made here, that this witness had never heard of the ex-pits for financing, if it was meant to suggest

gr4 5665

that he hadn't heard of them in 1963, I think that it was a misstatement because the witness would say that he had heard of them then, that he did discuss it with the Chicago Board of Trade and that in his views as to whether they were permitted was not one that the other 14 or 15 members, whatever the number is, agreed with.

So that, your Honor, in any event, he doesn't qualify for the New York Produce Exchange whatever he may qualify for in the Chicago Board of Trade.

I don't mean to be insulting to his qualifications. He's obviously a very fine man.

MR. HARRIS: Basically it seems to me, and I don't wnat to -- the defendants are saying if you take a fellow who is a mechanic and he's familiar with Chevys, and you have a case involving Fords, that he can't testify about it. I don't think that's right. I think these exchanges do operate the same way.

THE COURT: Mr. Harris, I really understand the problem involved in this case that you are burdened with. I'm required to allow things that are in the rules.

gr5 5666

I don't see any way that Mr. Raclin can be qualified to tell us anything other than custom and usage. I suppose you made your tender. Maybe we ought to end it.

You made your tender. You made your record.

MR. HARRIS: Can I make my offer of proof on what he would say on the merits? This was based on the background information.

THE COURT: Go ahead.

MR. HARRIS: On the merits, your Honor, we submit that Mr. Raclin would testify that the duties of directors on the New York Produce Exchange were similar to the duties that he had in 1963 on the Chicago Board of Trade, and that those duties included the duty to prevent manipualtions, attempted corners, attempted squeezes, etc.

Mr. Raclin would further testify that based onthe warning signs that existed during 1963 on tne New York Produce Exchange, which is set forth in Plaintiff's Exhibits 122 to 126 in evidence, that in his view that indicated that the cottonseed oil futures market was unhealthy during 1963.

He would have indicated that the market was unhealthy in 1963 and that somewhere in the summer of

gr6 [5667]

1963 Mr. Raclin would have felt that it was appropriate to make an investigation to find out what was going on. He would have indicated the scope of the investigation to include toing to the clearing house and finding out what clearing members held the positions, and in which cases we heard, your Honor, it would have been found out that Ralph Peters held 58 per cent of of the long position.

The investigation would have included going to Ralph Peters and finding out who his customer was, which turns out to be Allied and Allied had a huge position at that time.

Mr. Raclin would further testify that this information is not confidential from the board when it's doing an investigation. In his experience, the Chicago Board of Trade gets this kind of information all the time from its clearing house and its audits and investigations committee, that it goes out and makes these investigations on a regular basis.

He would further testify that the exchange has a power to limit reduce positions, that in his view anybody who holds 50 per cent of the market or more or even less than that percentage presents a danger to an orderly market, and that as a regulator in

rg7 [5668]

1963 he would have required Mr. Peters, Mr. DeAngelis to reduce that position in the interest of protecting an orderly market.

He would also testify, your Honor, that it was not custom in the trade to have ex-pit trading involved in financing arrangements, thathe had never heard of it prior to when Mr. DeAngelis came alone. He thought it was wrong at the time and he still does. He does not think it's proper to use ex-pit trades to roll over, roll forward positions to more distant months.

He would testify that when Mr. DeAngelis did in 1963 on the New York Produce Exchange constituted a manipulation, that one part of the manipulation was the series of transactions that we have gone through between Allied and Continental Grain and Allied and Bunge involving financing of registered warehouse receipts and ex-pit transactions made in connection therewith

He would have also testified that Allied's activities of buying at the close and continually buying futures contracts constituted part of the manipulative activities.

He would testify to that type of

rg8 5669

hypothetical question I asked to Professor Arthur, that if you assume that Mr. DeAngelis undertook all of these activities to stave off financial disaster in the hopes that somehow or other maybe some export contractor would come along and save him, that in his view that would be manipulative and it was manipulative.

He would also testify that these ex-pit transactions that Mr. DeAngelis engaged in in the New York Produce Exchange had an artificial effect on the market and were, therefore, manipulative.

He would also testify, your Honor, that in 1963 he was generally familiar with the activities of Mr. DeAngelis because it was common knowledge in the trade that Mr. DeAngelis was accumulating huge positions in soybean oil and other vegetable oils and that, in fact, it was known to him in the trade that Mr. DeAngelis seemed to be buying at high prices and selling at low prices and that there were lots of indications that Mr. DeAngelis's financial condition should have been in doubt.

He would further testify about the Chicago Board of Trade investigation of Mr. DeAngelis' position in the spring of 1963, which there's been some testimony in this trial about, that they went to Bayonne and looked

gr9 [5670]

at Tino DeAngelis' contracts, and he submitted positions, and that when the Chicago Board of Trade determined that Mr. DeAngelis' position equalled 44 per cent of the open interest in the March contract, they ordered his broker, Mr. Peters, to get off their overwhelming position and reduce it.

Finally, your Honor, with regard to the ex-pit trading. I missed one point, your Honor. The ex-pit trading had an artificial impact on the market in that it affected volume and open interest, and the manipulatory activities of Mr. DeAngelis were the reason why these warning signs existed, and had the warning signs been pursued, the manipulation would have been uncovered.

THE COURT: All right. Thank you, Mr. Raclin.

(Witness excused)

hprf 2

sure about the other days and we tried to reach him. He will be back in his office in 40 minutes or a half hour or something and perhaps by 3:00 o'clock or so I will be able to give you a firm answer.

We also put a call in to Professor Gray because it may be necessary to call him back, to comment on the CEA report, but I doubt he would be able to come.

It is morning out there and we hopefully will get through now. His home phone was busy and his --

THE COURT: It is about 10:00 o'clock. He should be up by now.

MR. HARRIS: One other thing, your Honor, since I averted to the CEA report, this morning you indicated you were referring to an affidavit by Mr. Caldwell in that regard and I was wondering if for the record we can identify which affidavit that is because there were several affidavits.

THE COURT: Defendant's Exhibit 107 for identification, an affidavit that was submitted in the District of Columbia -- no, I'm sorry, it was in the bankruptcy proceeding on February 24, 1966; I guess it was presented here.

MR. HARRIS: I don't see that, your Honor.

hprf 3 [5688]

I have several in front of me.

MR. O'DONNELL: Your Honor, with respect to the question of the rebuttal case, I thought Mr. Harris and I have an understanding that the witnesses, our witnesses, and they were going to have Mr. Raclin, and now he seems to be expanding the list which includes two professors. I suppose because of the EAC thing, that is --

THE COURT: That is what he said yesterday.

MR. O'DONNELL: I think Professor Farris is not going to talk about that. Then maybe we want Professor Hieronymus.

THE COURT: If you will relieve me of all these various exhibits you have given me, I would appreciate it.

MR. HARRIS: Your Honor, just for the record I have looked at Defendant's Exhibit 107. Are you referring to the top affidavit which is filed June 24, 1965?

THE COURT: Yes.

MR. O'DONNELL: Your Honor, with respect to Professor Farris, I don't have any understanding from Mr. Harris that he is going to be testifying about the CEA reports. It seems to me he is going to

gwrf 3

of Haupt, for, prior to his appointment he had no connection whatsoever with Haupt when it was actively engaged in business as a broker-dealer."

Then I would like to continue, your Honor, at page 5 with the first full paragraph and the first sentence of the next full paragraph.

"As a result of the events set forth in these answers Haupt's business was destroyed and it and all its individual general partners were made insolvent. Haupt also was suspended on November 20,1963 by the New York Stock Exchange for violation of its Rule 325, the so-called 'net capital rule' requiring member firms to maintain their customers' interests. Eventually Haupt was adjudicated a bankrupt in proceedings which are still pending in the United States District Court for the Southern District of New York (No. 64 B.259.

"The losses referred to above arose in connection with dishonest, fraudulent and criminal acts of certain Haupt employees, fraudulent practices of Mr. DeAngelis, as well as the receipt by Haupt of forged and counterfeit instruments."

MS. KAYE: This is like stereophonic sound. I now go to page 38.

"Answer to interrogatory No. 2:

"Mr. Stevens assumed responsibilities

gwrf 4 [693]

with respect to the handling, operation and supervision of the Commodity Department in the middle of July 1963. "

"The Haupt partnership acquiesced in his responsibilities with respect to the handling, operation and supervision of the Allied accounts. There is no known writing to this effect."

Page 43:

"With respect to any reports Stevens may have received regarding the Allied accounts:

"(a) State whether such reports were made orally or in writing; (b) if made orally, state the date of each such report, the names of the persons who rendered such report and describe the contents thereof.

"From in or about the middle of July 1963 Mr. Stevens received on a daily basis both oral and written reports directly concerned with the Allied accounts.

"The date of each such oral report to Mr. Stevens cannot be specifically designated, but they are believed to have been made one or more times every day. These reports included the following:

"(i) Routine day-to-day communications relating amount other things, to position and margin;

"(ii) Reports by Mr. Newman (and perhaps by other Haupt employees(that Allied was seeking

gwrf 5 5694

additiona export loans and other types of financing and direct requests by Mr. DeAngelis to the same effect;

"(iii) Reports by Mr. Newman (and perhaps by other Haupt employees) in or about September 1963 that Allied desired Haupt to accept produce margin.

"(iv) Reports by Mr. Newman (and perhaps other Haupt employees) at various dates that Allied wanted to increase the periodic limits imposed by Mr. Stevens on its futures position at Haupt.

"(v) Reports by Haupt personnel regarding proposed ex-pit transactions in which Allied desired to engage through Haupt.

"vi) A report by Mr. Berg of the New York Produce Exchange in late September 1963 concerning the dangers implicit in Haupt's financial exposure in connection with the futures position it carried for Allied, and of the need for establishing that Allied's position was a legitimate hedge.

"(vii) Reports by Mr. Berg and by Mr. Weinstein, of the New York Produce Exchange Clearing Association, on October 15,1963, respectively, regarding the danger implicit in Haupt's financial exposure in connection with the futures position carried for Allied and concerning the potential impact upon Haupt of the escalated margin

gwrf 6 [395]

requirements which had been announced on or about October 10, 1963, to become effective on November 15, 1963, to become effective on November 15, 1963. These escalated margin rates would require Haupt to put up substantially increased amounts of margin starting with the close of business on November 15, 1963.

"(viii) A report by telephone sometime during the week of October 20, 1963 by Mr. Barton (who was absent from the office during the period of September 27, 1963 to November 11, 1963, due to serious illness-- stating that the Allied futures position at Haupt was becomi too large and the financial exposure too great, and further suggesting to Mr. Stevens various methods of reducing Haupt's exposure.

"(ix) Frequent reports by Mr. Goldfogle, an independent floor broker, throughout the fall of 1963 that Haupt should 'put on the brakes' with respect to permitting a further increase in the cottonseed oil futures position maintained by Allied in the firm, because the resulting financial exposure to Haupt was too great.

"(x) Reports by Mr. Beetz, throughout the period of Mr. Stevens' control over the Allied accounts, as to the financial needs of Haupt arising from the growing activity in the accounts and Haupt's relationships

with variious banks with respect to such needs, as well as concerning the technical aspects of the financing of these needs, including the necessity for documentation such as registered and non-registered warehouse receipts, bills of lading, verifications of insurance, forward sales contracts and promissory notes.

"(xi) Mr. Barton's recommendation on November 11, 1963 that the Allied regulated account should be frozen immediately.

"(xii) An inquiry by Mr. Beetz on November 15, 1963 as to whether three Allied checks in the aggregate amount of $1,151,000 (which were uncertified and therefore tendered contrary to established procedure), received by Haupt from Allied in connection with margin calls made as of the close of business on November 14, 1963 should be certified and deposited in order to make the proceeds immediately available to Haupt.

"(xiii) A report by Mr. Barton on November 15, 1963 that in his opinion the market could drop considerably that day.

"(xiv) A report by Mr. Barton on November 15, 1963 that his next weekly commodity market letter was going to advise Haupt's customers to sell soybean and cottonseed oil futures.

gwrf 8

[7697]

"(xv) A report by Mr. Newman on November 15, 1963 to the effect that a representative of Allied (probably Mr. Rotello) had told him that Allied was experiencing financial difficulties and that Allied's officials were to meet on Saturday, November 16th, in an attempt to work out these financial difficulties. The same information was given Mr. Stevens by Allied on the same day.

"(xvi) A report by Mr. Rotello on November 16, 1963 to Messrs. Newman and Stevens to the effect that Allied was having financial difficulties to which the officers of Allied did not have any solution.

"(xvii) Reports by Mr. Beetz on November 18, and 19, 1963 regarding Allied's failure to provide fund to meet outstanding margin calls of November 14, 15 and 18, and requesting instructions from Mr. Stevens.

"(xviii) Numerous reports by Messrs. Barton, Newman and Schwartz (and by other Haupt employees) on November 18, 19, 1963 concerning the financial predicament of Allied, the deteriorating commodity market conditions and the status of the Allied accounts, including Allied's failure to meet margin calls.

"(xix) Throughout this period Mr. Stevens was repeatedly and fully informed of all relevant matters

gwrf 9 5698

regarding the Allied accounts and Haupt's current and increasing indebtedness and exposure, as well as of Allied's withdrawals from Haupt of excess variation margin generated by the rising market through November 14, 1963. Nevertheless, as Mr. Stevens received this information he failed to inform the partners of Haupt of relevant facts or of the significance of this information regarding the firm's financial structure and the potential exposure.Mr. Stevens did not suggest or take any action to protect them or their firm. Mr. Stevens, in fact, actually took significant actions that increased Haupt's difficulties or were illegal, as set forth in the answers herein. Mr. Stevens did not report his taking of these affirmative actions to the partners of Haupt."

Then I go to page 6, Mr. Kirsch.

MR. KIRSCH: Did you talk of just oral reports or written reports? The next sentence says: "No Haupt partner saw any such written reports."

Then I go to page 58, paragraph 4.

"On November 19, 1963 Messrs. Brenner and Kaufman met with officials of the New York Produce Exchange and the New York Produce Exchange Clearing Association."

gwrf 10

5699

MS. KAYE: Page 65, interrogatory 12. This is the question:

"With respect to whether Mr. Stevens may have improperly released funds to Allied when Allied was indebted to Haupt for substantial amounts:

"State the reason for such release of funds and state the reasons why such release was improper."

This is the answer which was given by plaintiff.

"It would appear that these funds represented excess variation margin.

"Such releases were improper because they were made at a time whem, one, Allied total indebtedness to Haupt exceeded $2,500,000, the limits set forth in the letter of intent and the non-regulated account reflected debit balances in excess of $3,000,000.

"(ii) Allied had not paid in full to Haupt the original margin which Haupt had remitted to the New York Produce Exchange Clearing Association and to its Chicago brokers and,

"(iii) Mr. Stevens knew that escalated margin requirements were to be put into effect by the New York Produce Exchange Clearing Association on November 15, 1963, which, considering the number of contracts held by Haupt, would, and did, result in

grf 11

an additional margin obligation of approximately $2,800,000. Mr. Stevens was repeatedly informed of the consequences of said increase upon Haupt's financial condition."

Then I go to page 106.

MR. KIRSCH: At page 92, the fourth full paragraph.

"None of the overnight loans of November 18th is presently outstanding. They were paid off by use of the proceeds of day loans taken out by Haupt on November 19,1963."

Then on page 94, paragraph 16:

"All the securities pledged with the banks for the purpose of obtaining overnight loans on November 18th were subsequently returned to Haupt."

MS. KAYE: I would like to continue there.

"The hypothecation of customers" --

MR. KIRSCH: I object to the following thing. I was just completing the record from the document we read this morning. I don't think it adds anything to what was admittedly said in the prior document about the fully paid securities being collateral.

THE COURT: I would prefer for the two of you to have agreed.

gwrf 12

5701

MR. KIRSCH: This is one of the few areas where we were unable to work it out.

THE COURT: Mrs. Kaye may read hers. If you want to read something else, do.

MS. KAYE: "The hypothecation of customers' fully paid securities as collateral for overnight loans on November 18th was in violation of Section 8-C of the Securities and Exchange Act of 1934.

"The hypothecation of customers' fully paid securities in connection with overnight loans was in violation of Rule 8-C(1) of the Securities Exchange Commission.

"To the extent there was any violation of the regulatory statute, there would also run counter to the customs of Haupt as well as the financial community. This pledge also violated New York Stock Exchange Rule 402."

May I proceed with page 106?

MR. KIRSCH: Yes, please do.

MS. KAYE: "As a result of an ex-pit transaction on September 25, 1963, Haupt's answers to the New York Stock Exchange questionnaire of September 26, 1963 reflected a reduction of 2,950 cottonseed oil contracts, inclusive of the 2,454 contracts referred to above, in the outstanding futures position of Allied, from

gwrf 13

5702

5,483 contracts having a market value of $42,800,000 to $2,533 contracts having a market value of $20,000,000."

"On September 30th, after the effective date of the September 26, 1963 questionnaire, Mr. Stevens authorized the purchase of 2,454 December cottonseed oil contracts from Peters and thus reestablished the previous Allied position. The Haupt partners and the New York Stock Exchange officials therefore could not know or understand the magnitude of Haupt's opposition by reference to the answers to the New York Stock Exchange questionnaire. When the position was reimposed on September 30, 1963, Mr. Stevens failed to inform the New York Stock Exchange.

"The accounting effect of the foregoing transaction was, in fact, so misleading as to result in an increase of $800,000 in the credit balance of the related account."

hpr1 [5703]

MR. KIRSCH: I think you go to 149. I have something at 131.

"Haupt becamse insolvent in connection with its business relationships with Allied, transactions in the Allied accounts, the manner in which these transactions were conducted and the methods by which they were processed and documented as described with particularity in the answers to these interrogatories.

"As a consequence of the foregoing Haupt's business was destroyed, the firm was suspended by the New York Stock Exchange on November 20, 1963, and subsequently by all securities and commodities exchanges of which it had been a member and finally Haupt was adjudicated a bankrupt."

MS. KAYE: 149:

"Haupt earned gross commission on Allied transactions and interest from loans of Allied prior to November 16, 1963. Interest on export loans amounted to approximately $98,000. Gross commissions from the regulated account amounted to approximately $630,000. The commissions earned by Haupt from the regulated account for the period October 1, 1963 through October 1, constituted 13.4 per cent of Haupt's gross income for that period.

hpr2

5704

"For the period November 1 through November 15, 1963, the gross commissions from the Allied regulated account amounted to approximately $215,000 and from other accounts approximately $660,000."

MR. KIRSCH: We have agreed those commission figures from the Allied account include both cottonseed oil and soybean oil figures but we don't have the data available to separate out the commissions earned on the two different types of transactions.

MS. KAYE: I have just one last paragraph at page 170:

"On November 15, 1963, Haupt received three checks totalling $1,151,000 from Allied by messenger purportedly in payment of the margin call in that amount made by Haupt on November 14.

"Upon their receipt Mr. Beetz requested authorization from Mr. Stevens to have those checks certified. Mr. Stevens refused to grant this authorization. Mr. Stevens told Mr. Beetz that he would take care of the matter and that Mr. Beetz should forget about it.

"Mr. Stevens took the checks into his possession and placed them under his desk blotter where they were found on or about February 12, 1964,

hpr3 [5705]

by Mr. Kamerman. Apparently no one had any further knowledge of of contacts with these checks during the intervening period."

That is all that I have on this document.

MR. KIRSCH: I go to page 173.

MS. KAYE: Where does that begin, Mr. Kirsch?

MR. KIRSCH: I will show it to you.

MS. KAYE: I object to that, your Honor, about what authority Mr. Stevens --

MR. KIRSCH: It is the answer to interrogatory No. 67, your Honor.

MS. KAYE: I don't think that is relevant at all.

MR. KIRSCH: Your Honor, I think --

THE COURT: If you will allow me to read it.

MS. KAYE: The first objection, your Honor, is on the grounds of relevance, and the second one is, I believe you asked yesterday that we read facts from these documents and this is really a legal point and not a factual point.

MR. KIRSCH: When you've read it, your Honor, may I be heard.

hprf 5 5716

from September 13th to November 13, 1963, there was at all times, as is shown in charts 1 and 2 and also in the following table, a 'normal' market for both oils; that is, the forward delivery months were priced successively above each other. Examination of prices of the May and July 1964 futures not shown in the table also revealed that the same price relationship extended to these futures as well. This pattern of price relationships between futures suggests that a strong price influence in this period was the burdensome supply and the cost incident to carrying supplies forward to later in the season. At no time was the market in an inverted pattern of price which is an indication of tightness of supply or price abnormality. "

The top of page 10:

"Throughout the July-November period, as prices of both oils rose and fell, the cash-futures price spreads remained basically unchanged. The larger spread between cash and futures prices for cottonseed oil is due to the fact that the cottonseed oil futures contract calls for delivery of semi-refined oil, whereas the soybean oil cash and futures prices both partain to crude oil which is deliverable on that contract.

"The close alignment in cash and futures prices

gwrf 2 [5720]

Allied Crude Vegetable Oil Refining Corporation's total long cottonseed oil position as of October 31, 1963, 8,938 tanks cars, equalled only about 25 per per cent of this available supply. Accordingly, as of October 31,1963, the futures and spot cottonseed oil positions held by Allied Crude Vegetable Oil Refining Corporation cannot be considered to have constituted a corner on the available supply of cottonseed oil.

"Investigation of Possibility of a Squeeze:

"On October 31, 1963 the New York Produce Exchange cottonseed oil future closest to maturity was the December 1963 future. Allied Crude Vegetable Oil Refining Corporation held a long position of 5,445 tank cars in that future, 89.3 per cent of the total long open interest in that future, of 8,100 tank cars.

"As of October 31, 1963, there were in deliverable space 3,860 tank cars of Prime Bleachable Summer Yellow cottonseed oil, the type required on futures contracts. Of this amount, 765 tank cars were held by warehousemen having space licensed for delivery by the New York Produce Exchange and 3,085 by other persons holding short positions in the December 1963 future. However, the total supply of oil, including the 3,860 tank cars of Prime Bleachable Summer Yellow in deliverable

space, equalled 9,130 tank cars on a refined basis and we now know of only eight which were owned by Allied Crude Vegetable Oil Refining Corporation. In addition to the supply on hand, as of October 31, 1963, the cottonseed oil crushing industry if operating at capacity could have produced the equivalent of 6,900 tank cars of cottonseed oil,refined basis, during November and the first half of December 1963.

Thus, as of October 31, 1963, there was a potential supply of 16,000 tank cars of cottonseed oil from which to draw the amount necessary to deliver against the 6,100 outstanding December contracts. With 3,860 tank cars already in deliverable position, shorts had a potential supply of over 12,000 tank cars from which to get 2,240 to deliver, if all holders of long contracts demanded delivery."

I will pas to the conclusions, your Honor.

Page 29:

"Conclusions: This report answers the following questions: (1) Was there artificiality in cottonseed oil and soybean oil prices, and if so, was such artificiality caused by the operations of Allied Crude, and (2) did Allied Crude corner the cottonseed oil market or was it in a position to squeeze the shorts ir

gwrf 4 [5722]

the December 1963 cottonseed oil futures?

"Many economic factors in the commodity picture developed during the September-November period that had definite effect not only on cottonseed oil and soybean oil prices, but also on other important commodity price levels. The strength shown by the overall commodity price index was associated with Russia's entrance into the free markets of the world. The period was one in which commodity markets were highly stimulated on prospects of Russia buying commodities in which she was thought to be in short supply. Disappointment over the delay in any actual buying by Russia coming to the fore in November dampened price expectations in most commodities at that time.

"The pattern of futures prices and cash prices in both oils was so closely aligned in the respective commodities and in relation to each other that no abnormality was apparent in the comparison of these prices. Actually, the price pattern of the two oils indicated that the markets were reflecting the weight of the supply of oils. Because Allied Crude's buying conformed closely to the economic climate prevailing and with the general price situation, it was not possible to isolate the effect of Allied Crude's individual futures markets operations upon price from that of the rest of the market.

gwrf 5 [5723]

"It was considered, therefore, that the general market influences inflating the structure of all important commodity prices were the primary forces behind the commodity price movements prevailing during the period. In light of these factors, it is concluded that there was no artifical forces exerting undue influence upon cottonseed oil and soybean oil prices.

"As of October 31, 1963, Allied Crude held a long position in cottonseed oil, cash and futures combined, of approximately 8,938 tank cars which represented only about 25 per cent of the supply of cottonseed oil for the 1963-64 crop year. It, therefore, did not have a corner of the cottonseed oil market.

"As of the same date, all persons holding short positions in the December 1963 cottonseed oil future on the New York Produce Exchange were in a position to satisfy their contracts either by delivering oil or by buying futures contracts from persons other than Allied Crude who held long positions in the futures markets. Consequently, Allied Crude did not have control over the December 1963 cottonseed oil future, and, therefore, was not in a position to squeeze the shorts.

"In the fall of 1963 there were larger than normal supplies of both soybean oil and cottonseed oil.

gwrf 6 [5724]

In view of the supply and demand conditions existing at that time in the vegetable oil markets, it is not reasonable to believe that an oil firm as experienced as Allied Crude would attempt to corner the oil markets or attempt to manipulate oil futures prices during the season of peak availability of supply. In our analysis of Allied Crude's operations during this period, we found no evidence which would indicate that the firm built up its long positions in the futures markets for any such purpose."

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5725

MR. HARRIS: I think the record should reflect that this document is undated and unsigned.

THE COURT: Mr. O'Donnell, anything else? Is that it?

MR. O'DONNELL: Can I have just a second, your Honor?

(Pause)

MR. MINNEROP: Your Honor, without going into the subject matter of this as regards Merrill Lynch's counterclaim, Mr. Harris and I have entered into a stipulation which will be read, if it will be read at all, at a subsequent time.

MR. O'DONNELL: I believe, your Honor, I have the auchority to speak for the defendants on this point alone, namely, that the defendants rest.

THE COURT: All right. We will take a recess. You will be excused for a while. Then I'll give you some notes.

(Jury absent)

MR. HARRIS: Your Honor, at thie time the plaintiff would move to dismiss the counterclaims of the defendants excluding defendant Merrill Lynch to do this stipulation that we have worked out that we can address ourselves to.

gr3

5727

MR. LIMAN: I move to dismiss.

THE COURT: Are you prepared to go forward right now?

MR. HARRIS: What I could do today, your Honor -- we had a few exhibits that you had indicated you would admit if we revised them, Mr. Ellison's charts. I have them revised.

THE COURT: That's all you can do?

MR. HARRIS: One or two other documents. That's really it. It's only a matter of five minutes. We don't have a witness.

MR. O'DONNELL: Could we hear from Mr. Harris on the subject of witnesses next week?

MR. LIMAN: Can you hear today on who his witnesses will be next week?

MR. O'DONNELL: Yes. I was hopeful that your Honor would reconsider again on the Monday. I could use it.

THE COURT: I could use it too. If I'm going to have to be here for two more weeks, I'm not prepared to take the time.

MR. O'DONNELL: I would be hopeful we could finish next week.

MR. HARRIS: Yes, I would expect to.

gr4 5728

Your Honor, at this time Mr. Bernfeld indicated he has been able to reach Messrs. Farris and Gray and we could have Mr. Farris on the stand on Monday and Professor Gray on Tuesday and that would be it for the plaintiff in rebuttal,your Honor.

The documents I'm talking about,we can do in five or ten minutes.

THE COURT: We can meet and hear Professor Farris and then Professor Gray?

MR. HARRIS: Yes,your Honor.

MR. LTMAN: What happens if Farris doesn't take a full day?

MR. HARRIS: I'm just telling you what I just heard. I have been in court all day, your Honor. I haven't had a chance to work out all the logistics.

THE COURT: Suppose we didn't meet on Monday, would Mr. Farris be here?

MR. HARRIS: Professor Farris apparently indicated he's got other responsibilities back at his university on Tuesday and Wednesday. He could be available Thursday. I appreciate that that causes a hiatus. That's why we figured on the Monday, Tuesday arrangement so we can get the two gentlemen on and get it over with speedily, and that would be the end of the

gr5 [5729]

plaintiff's rebuttal case.

THE COURT: All right.

I don't particularly like that. I suppose that's it.

You think he's going to take a full day, Mr. Farris?

MR. O'DONNELL: I don't understand why Mr. Farris has to be heard on a holiday. Why can't he be heard on Tuesday?

THE COURT: Because he has some commitments, I gather.

MR. O'DONNELL: It seems to me he ought to make the choice.

THE COURT: I certainly don't relish the idea of coming into hear him. I just have no idea how long it's going to take. What'd he coming in for?

MR. O'DONNELL: Just to duplicate what Professor Gray has already done, I think.

MR. HARRIS: We would like to have a second opinion on certain of the factors, on these ex-pit transactions and some ofthe other things. We will attempt to cut it down so it wouldn't take more than a day. It may take somewhat less.

We could anticipate a day with cross-

gr6 [5730]

examination.

MR. O'DONNELL: I remember distinctly Mr. Harris saying in this courtroom with respect to experts that Mr. Farris would be around only for loose ends, if there were any, after the other experts finished.

THE COURT: He regards this as a loose end.

I suggest that you try to get him back on the phone and see whether there is any possibility of his coming here on Tuesday. If there is no possibility of his coming --

MR. BERNFELD: I spoke to him a number of times today. He's made every effort. He's unavailable Tuesday and Wednesday. He's available Monday and Thursday.

THE COURT: All right.

MR. MINNEROP: Before we close the record for the day, your Honor, as I mentioned earlier, as Mr. Harris mentioned, plaintiff and defendant Merrill Lynch have reached a stipulation as regards Merrill Lynch's counterclaim which is in the nature of an offset.

I would like to read that stipulation into the record if I may.

THE COURT: All right.

MR. MINNEROP: It is stipulated and agreed

between plaintiff and defendant Merrill Lynch that defendant Merrill Lynch paid $1,407,787.72 to the New York Stock Exchange fund established by that exchange voluntarily after November 20, 1963 to pay Haupt's obligations to its customers other than Allied.

We both agree that this would not be read to the jury unless there is a finding of liability in the first instance.

THE COURT: All right. I suppose there's no point in my delaying announcing this decision. I have come to a decision, and that decision is to dismiss the action against the corporations.

The basis for it, there is nothing in the record to establish that Mr. Fashena or Mr. Vogel or Mr. Klein or Mr. Anderson operated as members of the board of managers of the produce exchange and functioned on behalf of their various corporations or did any act on behalf of or with carrying out their policy. There's nothing in the record on that. So that action is dismissed.

I am, of course, still reserving decision on the other matter. I am not sure that I'm going to have to make a choice as to whether I prepare my charge or do that. I can't do both.

Q And what about Exhibit 123, which is the open interest? How is that information available to members of the Board of Managers of the New York Produce Exchange?

A This is from commodities futures statistics. These are statistical bulletins published by the Exchange Authority and generally available and these show the size of open interests and futures as of the mid-month and the end of the month in each month.

MR. O'DONNELL: May I ask your Honor how often did publications publish?

THE WITNESS: The information is available at the end of every month.

MR. O'DONNELL: How often is it published?

THE WITNESS: Every month.

Q Professor, looking just at the information on Exhibits 122, 123 and 124, let us assume that you are or you were on the Board of Managers of the New York Produce Exchange during 1963, and you have available to you the information set forth on Exhibits 122, 123 and 124, in your opinion, is there any information set forth on those exhibits that would have caused you, as a member of the Board of Managers, to have some concern about the state or the healthiness of the cottonseed oil futures market?

MR. O'DONNELL: Objection, your Honor. No foundation.

THE COURT: Overruled.

You may answer.

A I would say that --

THE COURT: The answer is would it cause you concern. The answer is yes or no.

A Yes.

Q Again, assuming you are a member of the Board of Managers of the Produce Exchange in 1963, sir, at what point during the year would this information have caused you concern?

A If I were a member of the Board of Managers of the Produce Exchange, I would have a responsibility for assuring competitive conditions in the market and the prevention of price manipulation.

Knowing the possible sources of things like that, which come from dominant positions of a trader, I would be interested in knowing what things were developing which might indicate a dominant position of a trader.

So, if anything unusual happened, I would follow it up to satisfy myself, whether any single trader, or two or three, were becoming dominant in the market.

Now, the earliest time here is the ex-pit transactions in terms of timing. They begin to show up in the spring and I would say by April or May that I would begin to have some concern --

MR. O'DONNELL: I move to strike that, your Honor.

MR. LIMAN: Your Honor, he was asked based on three other exhibits and now he is talking about ex-pits. I don't know what the answer now is referring to.

MR. O'DONNELL: I move to strike the whole answer.

MR. HARRIS: Let me just direct --

MR. O'DONNELL: It was directed tothree exhibits.

THE COURT: Professor, I think you have to back up.

You are being asked about,as I understand it, about 122, 123 and 124, which had no relationship at all to ex-pits and you have to confine your answer to that.

You better start all over again.

With those three exhibits in mind would you have been caused concern?

hprf 6 Farris-direct 5764

THE WITNESS: Yes, they would have caused me concern and my concern would be because in that position as a member of the Board of Managers, I would be concerned about the abuse of market power, and anything which might lead to an abuse of market power and knowing the responsibility that the Exchange has to maintain a competitive market, I would begin investigating to find out whether there was in fact a developing situation of market power in this market.

Now, if you take Exhibit 124, which you showed me first, there is an increase which is clearly evident in July, of the increased share of the long open position that is held by the hedgers.

This could be two or three firms or it could be several or it could be only one. But at that point I would want to find out whether there was a developing market power position in the market that would endanger the competitive price-making process.

Now, if you turn to 122, in August, as we have said, there is a sharp jump in the monthly volume of trading.

This could reinforce the other exhibit because if there is market power in the market, and competitive price-making is being interfered with or

prices are being manipulated, there could be other traders in the market that would disagree and the volume of trading could pick up for that reason.

I mean, this is a signal that I would want to satisfy myself that something like that was or was not developing.

The size of the open interest would indicate again, the fact that that arose at the time when these other factors were going on, would again cause me to want to look into what was behind the rise.

Q Sir, I believe when you were talking about Exhibit 124 you indicated you would become concerned about the dominant position of the trade?

A Right.

hpr1 Farris-direct [5766]

Q Can you tell us why that would cause you concern?

THE COURT: He has just told us, Mr. Harris. I understood him.

He was concerned about a trade or small group of trading becoming dominant and endangering the competitiveness of the market.

Isn't that why you were concerned?

THE WITNESS: Yes.

Q You indicated that you would try and find out, when you saw the increase in the long hedging position that was going on.

How would you have gone about that if you were a member of the board of managers in 1963, tring to find out what was behind this increase existing?

A There are, I suppose, a couple of courses one could take.

One could go directly to the clearing association and ask for reports. One could go to the Commodity Exchange Authority and ask for positions of the traders in the market.

Q When you referred to Exhibit 122, the volume of trading, you said that you would want to satisfy yourself as to what that increase was caused by.

A Yes.

Q How would you go about satisfying yourself in that regard?

A I would want to know whether there is a developing pattern of increasing concentration in the hands of one firm that would cause the volume of trading to expand; whether this was a symptom of something which was developing that would impair the competitiveness of the market.

Q How would you go about trying to find that out?

A It would be important to find out the positions of the major participants in the market. That is, the share of hte open contracts that might be held by any one firm.

I would want to know that and then see who that firm was; what his position was in the cash market and other aspects, his financial stability and solvency and various aspects of his operations.

Q How, sir, would you go about finding out this information that you just indicated?

A In order to get basic information on the position of the trader himself, as I mentioned, I could go two ways: I could go to the clearing association,

down to the participants, or I could go to the Commodity Exchange Authority and ask for reports of positions.

Q Sir, there has been testimony in this case that as of July 31, 1963, Ralph M. Peters & Company, on the books of the clearing association was listed as holding 58 per cent of the long open interest.

Assuming that is true, for the sake of this question, sir, if you as a member of the board of managers in 1963 contacted the clearing association pursuant to the investigation you have just indicated you would make, and learned that Ralph Peters & Company was holding 58 per cent -- this would be at the end of July and August, sometime in early August '63 -- you learned that Ralph Peters & Company was holding 58 per cent of the open interest, would that information cause you concern or have caused you concern?

A I would carry it a step further and find out what trader or traders made up the 58 per cent.

Q There is further testimony in this case that as of July 31, Ralph Peters' position, long position was held substantially for Allied Crude Vegetable Oil a refining corporation, and that on July 31, 1963, Allied Crude held 87 per cent of the total open interest in the mere month --

A What was the date of that?

Q July 31.

MR. O'DONNELL: I object to this, your Honor. I don't know of such testimony in this case.

MR. HARRIS: It is an exhibit in evidence, your Honor, and Professor Gray discussed it.

THE COURT: The exhibit has been admitted.

MR. HARRIS: Yes, this is in evidence.

MR. O'DONNELL: May I see it?

(Handing)

MR. O'DONNELL: Your Honor, this is an exhibit with respect to Allied reports to the commodity exchange. It doesn't mention Ralph Peters' testimony at all.

MR. HARRIS: That is on a different exhibit.

MR. LIMAN: This is based from the confidential reports of Allied to CDE.

MR. HARRIS: Your Honor, we are exploring now --

MR. LIMAN: I am not objecting. I just want the record to be clear since he is showing him an exhibit that it is an exhibit based on confidential

information supplied by Allied to the CEA.

MR. HARRIS: And we are exploring an alternative approach to get the same information, your Honor. That is the purpose for this question.

I was in the middle of a question and I have kind of lost where I was so I will begin again.

Q There is further evidence in this case, Professor, that Ralph Peters & Company, the long position was held substantially for Allied Crude Refining Corporation and further evidence in the case that at July 31, 1963 Allied Crude held 87 per cent of the near month cottonseed oil futures cottonseed contracts, and 59 per cent of the overall contracts.

If you, sir, as a member ofthe board of managers in the course of this investigation learned that Ralph Peters was holding substantially all of the contracts for Allied and Allied held the percentage of contracts that I have just referred tl, would that cause you concern?

MR. O'DONNELL: Objection, your Honor. No foundation. The record in this case is exactly the opposite in this case. The record is, they could not define the position of the traders. That was confidential information, not known to the clearing association and

not the New York Produce --

MR. LIMAN: And at which time the CEA refused to divulge .

MR. HARRIS: That is not what I am asking, your Honor.

THE COURT: We haven't really moved very far because I have asked him about five questions ago whether something caused him concern and he said it would cause him concern and what he would do would be, he would seek -- one of the things he would do would be to ask the clearing association for positions and he would go to the CEA.

I gather that he is not at the CEA. He has --

MR. HARRIS: I am exploring the alternative approach of not going to the CEA.

THE COURT: You can't, if you are giving him a confidential report that only the CEA has. You are not doing that, Mr. Harris. You are asking about a report that I understand nobody had other than the CEA. You can't get that in August without going to the CEA.

MR. HARRIS: I think that's not so, your Honor. I think there is another way.

5772

hpr7 Farris-direct

THE COURT: Well, ask him. You can't ask him a question about something thatis confidential and then say if he found it out what other way is there.

BY MR. HARRIS:

Q Professor Farris, continuing our series of questions with you as the hypothetical member of the board of managers of the New York Produce Exchange in 1963, after you had gone to the clearing association, and you were informed that Ralph Peters held 58 per cent of the long open interest at the end of July 1963, what would you have done?

A I would want to know who were the participants or the traders.--

THE COURT: I didn't hear the first part of the question.

THE WITNESS: I would want to know who the traders are and what their positions were with Peters.

4A

elr1 Farris-direct 5773

Q How would you --

THE COURT: You want to know who Peters' clients were?

THE WITNESS: That's correct.

Q How would you go about finding that out?

A I would ask Peters.

Q And if Peters told you he was holding contracts substantially for Allied Crude?

A Then I would be concerned whether Allied might be becoming a very dominant factor in the market and I'd go to other members of the clearing association to find out whether they also might have had contracts with Allied.

Q Would you also go to Allied, sir?

A Yes. I would go wherever I would need to go to find out what hteposition of Allied was in the total market, because I think by that time, with that information there would be enough concern that I'd want to understand what Allied's activities were in the market.

Q If you learned through the course of this investigation that Allied held more than 50 per cent of the open interest, let's talk about all, forget the near month figures that I was talking about before, but just deal with a total, you learned that Allied

elr2 Farris-direct

held 50 per cent of all the cottonseed oil contracts on the long side, would you be concerned about Allied's position at that point?

A Yes, I would.

Q Again, as a hypothetical member of the board of managers in 1963, what would you do?

A If I were a member I think I would want the board to be informed of it, and I would also want to know more about Allied.

MR. LIMAN: Your Honor, I'm sorry, Professor Farris dropped his voice at the beginning. Could the question -- answer be read back? I got everything but his first two words.

(Record read)

Q What kind of information would you want to know more about concerning Allied, sir?

A Well, at that point I would like to know whether he was building a position which could even get larger. I'd want to know his financial strength, and I'd want to know his cash situation in terms of facilities and positions of oil.

Q Now let's turn, sir, to Exhibits 125 and 126, which, 125 is the deliveries to the exchange and 126 are the ex-pits.

Sir, was information concerning deliveries on the exchange and ex-pits available to the members of the board of managers of the New York Produce Exchange in 1963?

A Yes.

Q Sir, again with you as the hypothetical member of the board of managers of the New York Produce Exchange in 1963, is there any time in 1963 when you would have been concerned about the volume of ex-pit trading taking place?

A The ex-pit volume began increasing earlier in the year than the volume of trading, and I would have -- in fact, the increase in this measure is beginning in April and May and June and July. It actually starts around April or May that I'd begin to get concerned.

Q Can you tell us why an increase in the volume of ex-pit trading would have caused you concern as a member of the board of managers of the New York Produce Exchange?

A Well, a market is really set up for traders to buy and sell, and if suddenly a lot of the transactions were occurring outside of the market, I'd want to know why that was.

Q How would you go about finding that out?

A Well, again, I would want to know, I would follow up with an investigation as to who these ex-pit traders were, and whether this was associated with some other developing warning sign.

Q Turning to deliveries, the deliveries taking place on the exchange, sir, again would you as a hypothetical member of the board of managers of the New York Produce Exchange in 1963, is there any point during 1963 when you would have become concerned about the volume of deliveries taking place?

A I see that in the March settlement of the March contract, that 85 per cent of the contracts open on the first notice day were settled by delivery. This is a much larger percentage than existed in previous years, and the question again would come into my mind, is why.

Q Can you indicate to us what it is about increased numbers of deliveries on the New York Produce Exchange that would have caused you concern, as a member of the board of managers in 1963?

A Why it would have caused concern? There are some possible reasons why it might occur. and I would want to find out for sure what those were.

It's possible if the price were being manipulated that an acceptance of delivery would be a way of trying to affect the price on the market.

MR. LIMAN: You said there were possible reasons why it would occur. Is that the completion of the answer?

A Well --

Q I don't think you have to answer his question, but if you are not completed and you want to set forth additional reasons, go ahead.

THE COURT: He did indicate there were possible reasons, and he gave one. I was curious myself.

A Well, another reason might be that a company might wantto acquire the spot commodity and might stand for delivery as one way of doing it.

THE COURT: Would you read that answer back.

(Record read)

MR. LIMAN: Your Honor, as Professor Farris has undoubtedly perceived, he is now competing with a buzz saw, and if he'd make an extra effort to keep his voice up, we'd appreciate it.

THE WITNESS: I will do that, thank you.

Q Sir, did you state at what point in the year 1963 you as a member of the board of managers would

elr6 Farris-direct [5778]

have been concerned about the increase in the volume of deliveries?

A Well, the delivery to the market showed a substantial increase over March of the previous year, so at that point when those deliveries started coming in, I would be concerned.

Q As a member of the board of managerswhat would you have done at that point?

A Sought further information.

Q Would you elaborate on the kind of information you would have sought, and from whom?

A From who is engaging in the ex-pits and what other --

Q We are talking about the deliveries, sir. We are talking about the --

A The deliveries on the March contract in 1963?

Q Yes, sir.

A I would want to know information about that particular trader or who the traders were accepting deliveries, whether it was one or several.

(Pause)

THE COURT: Read back the question and answer.

elr7 Farris-direct [5779]

(Record read)

THE COURT: All right.

(Continued on next page)

Q How would you go about finding that out, sir, who the traders were?

A I would find out the transactions and I would go to the trading-- Clearing Association and find out the details of those transactions.

Q A number of your answers, Professor, involved going to the Clearing Association and getting information?

A That is a first step.

Q Wasn't that information confidential, sir?

MR. LIMAN: Objection to the form of that question. I have no objection to his giving testimony if he knows it as to the procedures of the Clearing Association.

Q I will rephrase it.

In your opinion, sir, would the information that the Clearing Association have been available to you. would have been available to you as a member of the Board of Managers in 1963?

A Of course --

MR. O'DONNELL: Objection, your Honor. No foundation for that question.

MR. LIMAN: I thought, your Honor, that we have had testimony from the Clearing Association and everybody else as to the fact that if a request was

elrf 4 Farris-direct 5783

Q Professor Farris, can you define for us in what your view constitutes a manipulation of a commodities futures market?

A That would be the artificial effecting of price difference from what supply and demand competitive conditions would generate.

THE COURT: Mr. Harris, I'm not going to -- I don't think we need Professor Farris to go through this business of defining manipulation of prices, et cetera. If you have something specific, fine, but I don't see any reason for us to go through this again. You are on rebuttal.

Q I am going to ask you to assume certain facts as true, and then ask you whether in your view those facts would indicate that there was a manipulation of price on the New York Produce Exchange of cottonseed oil futures contracts during 1963.

First, Professor Farris, I would like to ask you to assume that in 1963 Mr. DeAngelis, president of Allied Crude, and his company were experiencing serious financial difficulties, and that at that time Allied Crude was long in cottonseed oil futures and long in cash oil; and further, that at that time that Allied's cash oil was heavily financed by having warehouse receipts

pledged at various institutions and companies in return for loans to Allied. I would also like to ask you to assume that at that time in 1963 Allied could not afford a decline in the futures market of cottonseed oil futures because Allied did not have the funds to pay the margin calls that would have been attendant upon a drop in the market, a serious drop in the market.

I would also like to ask you to assume that Allied's intention was to stabilize the price of cottonseed oil futures, prevent it from declining to any great extent so that it could stay in the market with the hopes that a perspective buyer would come along, foreign government or somebody, and gave -- bid on a lot of cottonseed oil and that Allied could then bail itself out by supplying the oil in fulfilling these contracts.

Therefore, I would ask you further to assume that Allied embarks upon a program to stabilize the price pending this hopeful arrival of a contract, export contract, of buying futures contracts regularly in the cottonseed oil futures market, on occasion buying contracts at the close, which effected the settlement price from time to time, and finally, that Allied, rather than selling off its futures position in the near month as the near month approached, or the delivery

month approaches, that Allied engaged in the practice of stopping the warehouse receipts that were tendered and then engaged in a scheme of financing the stopping of these warehouse receipts by taking the receipts and then in turn tendering them to another company, and that other company would hold those receipts, give Allied the money for them, so that Allied could pay the short, it would tender it in the market; and then the company which was holding the receipts would go into an ex-pit transaction with Allied whereby the company would go short and Allied would go long in the next month, and they would hold those receipts until that next delivery month came up, at which point they would either give the receipts back to Allied in exchange for getting the money back and doing another ex-pit cancelling out the first ex-pit; or if Allied didn't have the money at that time to take back the receipts, they would either give the receipts at Allied's request to another company which would engage in a similar transaction or roll forward the position by holding the receipts until a more distant delivery month, and doing a further series of ex-pit transactions, rolling forward the futures position to that more distant month.

MR. LIMAN: May I understand though those

elrf 7 Far is-direct 5786

are the 10 assumptions that he is asking him to make?

THE COURT: He is not finished.

Q Now, Professor, based upon these assumptions, in your opinion did the activities of Allied Crude Vegetable Oil as I have described them constitute a manipulation of the cottonseed futures market in 1963?

A Yes.

Q Can you tell us the basis for your opinion?

A Allied was a large factor in the market and had the motivation and the capability to manipulate the market, and being that large and having that capability, and these events occurred, these would be consistent with preventing or trying to shore up a price difference from what competitive conditions might allow.

Q Let me break apart several elements.

With regard to the transactions I have described regarding the stopping of deliveries and the registered warehouse receipts and then the ex-pit transactions that I described just before, in your opinion would those transactions alone, in other words, if I took that part of the hypothetical alone without having to repeat it, would those transactions, the stopping of delivery and the tendering of the receipts to someone else and the ex-pits against them, would those transactions alone have an artificial effect on prices?

MR. LIMAN: It is my understanding you are

THE COURT: Anything has an effect on price. Any of the transactions, we have been told.

MR. HARRIS: If that is established, I will go on.

MR. LIMAN: Every purchase, every sale, every decision not to purchase and every decision not to sell has an effect on price by us.

MR. HARRIS: Then there was testimony put or by them that seems not to say that. If they are happy with that, I'm happy.

THE COURT: I thought you were talking about an artificially effected price. A manipulation is what we are talking about now.

Q Professor, maybe I posed the question incorrectly so let me not throw out intent.

If I refer you to those series of ex-pit transactions involving the registered warehouse receipts and I indicate that Allied's intention engaging in those transactions was to stabilize the price of futures, in your opinion would those transactions alone have had an artificial effect on prices in 1963?

A Yes.

THE COURT: Is your answer yes, without regard to the number? One transaction, two or without

regard to the number of transactions?

THE WITNESS: He was telling me about several transactions.

THE COURT: Let's say it means two. He didn't give you any number.

THE WITNESS: One of the points that I think is very important on whether you can artificially influence prices whether a trader has the capability, which means the size, in the dominant position, so he can undertake certain kinds of activities which would shore up price.

THE COURT: I understand that is your position.

What I was interested in, in regard to these transactions that he referred to, I was interested in whether your answer was yes, whether there was one of them or two or 15 or five. I just want to find out what area we are talking about. Would one be sufficient?

THE WITNESS: One probably would not.

THE COURT: But several would?

THE WITNESS: Yes.

futurea market or cash market?

MR. HARRIS: Cottonseed oil futures market.

A 50 per cent would be enough that I would be concerned and I would also want to know what the trader was doing in the caseh market and what his financial conditions might be, and on the basis of this information I would form a judgment as to whether he was in a dominant position in the market, and had the capability of manipulating price.

Q Let's talk about one of the other activities of Allied: buying futures contracts.

If you would assume that Allied engages in a program of buying substantial amounts of futures contracts, keeps increasing its percentage of the long position until ultimately it reaches 90 per cent of the long open interest, and you further assume that Allied's intention in doing this is to stabilize the market price so it buys as many contracts as necessary to prevent the market from falling, would those activities of Allied buying these contracts, would that intention constitute an artificial effect on prices?

A Yes.

Q And why is that?

A The activity would be undertaken by Allied with

the objective of shoring up the price and would have that influence.

Q Professor, when you consider a position of a single trader in the market who has more than 50 per cent of the open interest, would it be significant in your view whether or not that person is hedge or speculating?

A It would be -- this is one of the additional pieces of information I would seek. I would want to know what kind of cash business he was in and what kind of other facets surrounded his business operations.

It's sometimes difficult to determine whether a position is a hedging position or a speculative position. But, assuming it is a hedging position, a futures contract undertaken to offset a risk in a cash commodity, this is what I would normally think of as being a hedging position.

MR. LIMAN: Could the last few words be read back?

Q Sir, in your hypothetical role as a member of the board of managers of the New York Produce Exchange in 1963, how would you have gone about in determining whether Allied's position was a hedging position?

A I would want to go to Allied and find out what kinds of offsetting ocntracts in the cash market,

elr2 Farris-direct 5797

November 14 to November 18 isn't even in evidence as to him, so can we make it clear that you are not talking about Mr. Vogel?

MR. HARRIS: Mr. Vogel was not there at the meeting of the 14th, that is correct.

Q Professor, I'd like to ask you first to assume that on November 14, 1963 the New York Produce Exchange, and Mr. Ber the managing director of the New York Produce Exchange, received from the Commodity Exchange Authority pursuant to a request he had made the day before, a hand-written position statement setting forth the position in each contract month of all traders, long and short, who held more than 100 cottonseed oil futures contracts at the close of business on November 13 -- or November 12, 1963. This document is Exhibit 1 in evidence, and I will show you the document. I'd like to ask further to assume that on November 14, 1963 the managing director, Mr. Boyer, told the president of the Exchange, Mr. MacDonald, that he had that list in his possession, and that it contained information regarding the positions long and short of all traders having more than 100 contracts in cottonseed oil futures, and that during that same conversation the managing director told the president of the exchange that Allied or Mr. DeAngelis held

elr3 Farris-direct 5798

90 per cent of the long -- the open interest in the long side of the cottonseed oil fugures market.

I'd like you further to assume that the president of the exchange told -- let's stop there.

I'm going to promote you from simply being a member of the board of managers.

Taking a look at Exhibit -- assuming you know that the information contained on Exhibit 1 has been received by your managing director, and that you don't know the specific information set forth, but you know that it sets forth the positions of the longs and the shorts that hold more than 100 contracts, and you also know that Allied holds, the report indicates that Allied holds 90 per cent of the open interest, what in your view would you do at that point, sir, as president of the exchange?

MR. O'DONNELL: Objection, your Honor. No foundation.

THE COURT: Is there any evidence in the record that Mr. MacDonald knew that Allied had 90 per cent of the long?

MR. HARRIS: Yes, your Honor. Mr. Berg told him. He didn't give him the sheet, but he told him that Allied held 90 per cent.

THE COURT: All right. The objection is overruled.

A First of all, I would be very disconcerted that I hadn't done something about this a while before November 14, but at that point I think it was a rather urgent precarious situation, and I'm not sure what I would have done.

Q Let me give you some more facts, sir. I would like to ask you to assume that the president of the exchange told the managing director to put the report and lock it up, and then a meeting of the full board was convened later that day.

And at the full board meeting the board was not told that that document had been received from the CEA, that it had been received from the CEA, that it had been locked up; rather it was told that there was some concern about increased concentration and the board then appointed a control committee.

What the control committee did was to send out a position call by letter the next day to all of the clearing members, asking the clearing members to report in writing the positions each clearing member was holding and the names of their customers and what the position were as of November 20; that the report was due on

November 20.

A But the information is already at hand.

Q What I want to ask you is, in your judgment was that sufficiently urgent action under the circumstances?

MR. O'DONNELL: Your Honor, I object to the question. The witness has indicated that he thinks the position call was calling for the same information that appears on Exhibit 1. This record shows that that was not the case.

THE COURT: That has nothing to do with it. That is not a basis for an objection, Mr. O'Donnell. That goes to the weight of the testimony.

A Well, this would seem to be a quite deliberate way to react in a rather critical situation. I think that much more urgency would be called for.

Q Can you tell us why you believe that the information that I indicated that was received, that Allied held 90 per cent of the market, created an urgent situation.

A Clearly Allied had a very dominant position in this market at that time and there was the potential for rather erratic, unorganized

elr6 Farris-direct [580]

non-competitive type activity in the market.

(Continued on next page)

Q Professor, the information set forth on Exhibit 1 indicates that in the near month, which was December, Allied held 5,428 contracts out of a total of about 5,533 open contracts.

Turning your attention to the near month along, does that present any particular urgency there?

A Yes, that heightens the urgency even more.

Q Why is that, sir?

A Because the time is soon coming when the contract will be closed out.

Q So why does that make the situation more urgent?

A These contracts will have to be settled in some way. And the activity that the shorter in short positions might have to go through in order to try and settle these contracts would create a very erratic situation.

Q Professor, have you been retained by the plaintiff in this case to testify and to consult for the plaintiff?

A Yes.

Q Are you being paid to consult by the plaintiff and testify for the plaintiff?

A Yes.

hprf 4 Farris-cross [5811]

MacDonald and Berg.

Q Anybody else?

A I don't believe so.

Q Did you read the testimony of Professor Leuthold?

A Professor who?

Q l-e-u-t-h-o-l-d, Leuthold.

A No, I didn't.

Q How much time did it take you to read the testimony of DeAngelis, Gittleman, Gray, Dahl, Fontana and small amounts of MacDonald and Berg?

A Two full days.

Q How long each day?

A Oh, I would say 10, 11 hours.

Q Did you read anything else besides that testimony within the last two days?

A I don't believe I did. I spent most of my time familiarizing myself with the testimony.

Q Did you notice in that speed reading, if I might call it that, any references to a Commodity Exchange Authority report with respect to the cottonseed oil market in 1963?

A Was this the undated report?

Q I believe so, yes, sir.

A I saw a reference to it and I don't recall who was testifying about it.

Q You recall it undated but it has on its cover page dates, namely, an investigation with respect to July 1, 1963 to November 22, 1963.

A I didn't see the report.

Q You haven't seen the report to this very moment, is that correct?

A Now, this is a -- there was a report that was unidentified as to author and undated, that was with some materials that were given to me to look at, and I didn't get to it.

MR. HARRIS: Your Honor, instead of they guessing here, if Mr. O'Donnell wants to find out if the witness has seen the report he has in his hand, he can show it to him.

Q I show you Defendant's Exhibit 1-A in evidence, Professor Farris, and ask you if you have read that Commodity Exchange Authority report.

A No, I have not.

Q The plaintiff's attorneys never showed you that?

A This material -- is this dated, the report?

Q I don't believe it does carry a date except

as I indicated, it shows the period of the investigation.

A I know, but the report written is not dated.

Q I believe that is right.

A Who was the author?

Q Commodity Exchange Authority personnel.

A What person?

Q I am here to ask questions, not to answer them.

Would it help you to know that there is, as a part of this report, a memorandum by the administrator -- do you know who the administrator of the Commodity Exchange Authority was back in 1963 and '64?

A Yes.

Q Did you just see his name here?

A I knew it prior to that.

Q Do you see this memorandum from Alex Caldwell to George Merrin, assistant secretary:

"Attached is a copy of our revised report on the investigation of Allied Crude."

A Did Alex write that, write the report?

Q This is a memorandum in evidence from Alex Caldwell to George Marrin.

Is that good enough for you?

A Well, I'm interested in who wrote the report.

hprf 7 Farris-cross 581

Q The Commodity Exchange Authority wrote the report, and here is the autnentication of that.

"I, Wayne L. Olsen, acting director of the Bureau of Market Surveillance of the Commodities Futures Trading Commission do hereby attest the following annexed documents are true copies of the original records in my legal custody:

"Report of investigation of the operation of Allied Crude Vegetable in cottonseed oil futures and soybean oil futures, June 1, 1963, November 22, 1963, prepared by the U. S. Department of Agriculture, Commodity Exchange Authority, Washington D.C."

You have heard of them, haven't you?

A Did Mr. Olsen write the report?

Q Would you read it if Mr. Olsen wrote it? Is that the point?

A I just --

hpr1 Farris-cross 5815

Q I don't know who wrote it. It's put out by the authority, the Commodity Exchange Authority.

But you haven't read it.

MR. HARRIS: Your Honor, for the record, it wasn't put out by anybody.

A I never saw it in published form.

Q If you were interested in doing some research about this cottonseed oil futures market in the second half of 1963, you would find it significant, would you not, for purposes of your research, to review any report written by the Commodity Exchange Authority with respect to that market?

A I would want to know the author of the report, his credentials, what kind of background he had for undertaking the task.

Q And before you could bring yourself to read it you would want to know the credentials of the author, is that right, although it was a report of the Commodity Exchange Authority?

A If I had had more time I would have read it, but since it was lacking in authorship and date, I felt that it was of not as much importance as some of the other things that they were asking me to look at.

Q Are you familiar, sir, with the fact that

and I akimmed parts of it.

Q But did you read enough of the testimony of each of those three professors to know that each of them was asked questions about these same exhibits, 122 through 126?

A Yes, I did.

Q And did you read enough of the testimony of each to know that each had different interpretations and conclusions with respect to those exhibits?

A WEll, I know that Professor Arthur differed from Professor Dahl and Professor Gray.

Q And don't you know that Professor Dahl differed from Professor Arthur and also from Professor Gray?

MR. HARRIS: Your Honor, I'm not sure what he means by "differed." Obviously it wasn't word for word the same.

THE COURT: If you are going to object, make the objection.

MR. HARRIS: I object.

THE COURT: Your objection is overruled.

MR. O'DONNELL: Would you read the question.

(Question read)

A I would want to know in what important respects you say "differ," whether it's a minor respect or a rather large difference.

Q You're pretty good in asking questions. I guess you do that at school a lot.

Your function today is to answer the questions. You understand that, don't you?

Did you read enough of the testimony of those three professors to know what each differed from the other with respect to these vary exhibits, 122 to 126, and thatall of them differed from you?

MR. HARRIS: Objection, your Honor.

THE COURT: Objection is overruled.

A I read enough to know that he questions about the exhibits were frequently asked in different ways, and the answers which came back were not always the same kinds of answers, so I would need to go more to the substance of what the differences were.

Q Would you go along with me to this extent, Professor Farris, that looking at these bare statistics alone contained in Exhibits 122 to 126, you would not be surprised to find that knowledgeable men with respect to the commodities markets would have differing views and differing conclusions with respect to their

interpretation?

A Well, I think the one important interpretation is that when these warning signs began to develop, this was a signal to go after further information, and in fact that would be my position, I would want to go after further information.

(Continued on next page)

elr1 Farris-cross [5823]

Q I'm not disputing that, you made that clear. I'm not asking you that.

Could the reporter please read the question and see if you can answer the question that I am asking? And please try to be responsive, as I assume you ask your students to be.

(Question read)

A Well, I am bothered again, if you will pardon me, about the conclusions that they might reach and their interpretations. I think thatmany people with their backgrounds and training will look at the statistics in different ways, and while one might think a matter is of very large importance, another might play it down as a very small important matter. So to that extent I would say there would be differences in interpretations.

Q You were looking at these statistics as a professional economist, weren't you?

A As a professional economist who has been concerned with the effectiveness of market operation and competitiveness of market operation in a variety of markets.

Q Not in the cottonseed oil futures market?

A It is a market, a futures market, and of course

9B

Q Don't you know that in addition to being posted each day on the blackboard that the New York Produce Exchange received copies of so-called ex-pit letters confirming the ex-pit transactions one by one? Hasn't anybody ever told you that?

A I am aware that they received letters.

Q And so why would you go to the clearing association to look at the ex-pit documentation that you had posted on a board and also letters about it from the New York Produce Exchange?

A I might want to get more of a pattern of trade and confirm my figures.

Q To your knowledge, did the clearing association of the New York Produce Exchange in 1963 maintain separate records with respect to ex-pit transactions?

A The information that they had was, if a number of tradeswere made, so many of them would be designated as ex-pit.

Q You know that of your personal knowledge?

A Yes.

Q Have you seen such records with respect to the cottonseed oil market on the New York Produce Exchange and the clearing association?

A Yes.

(Jury present.)

MR. O'DONNELL: May I proceed, your Honor?

THE COURT: All right.

BY MR. O'DONNELL:

Q Professor Farris, I would like to direct your attention to Thursday, November 14, 1963. That is the day that Mr. Berg of the CEA received Plaintiff's Exhibit 1 in evidence from the Commodity Exchange Committee and Mr. Harris called your attention that with respect to the near month the deliveries in December 1963, Mr. DeAngeli had 5,428 long contracts in December out of 5,448.

Do you see that?

A Yes.

Q And I believe you told Mr. Harris that you regarded that situation, if it had come to your attention as a member of the Board of Managers, or if you were in Mr. Berg's shoes, perhaps, you would regard that as a fairly urgent situation.

A Yes.

Q If I told you that on November 14, 1963, two days after this statement, Mr. DeAngelis took 2,500 of those long contracts that were coming due in December and rolled them forward to March 1964, would you say that that somewhat lessened the urgency of the situation?

A I think that is correct.

Q If you had thought as of November 14, 1963, Mr. DeAngelis had been manipulating the market in cottonseed oil futures for his benefit up to November 14th, 1963, and had received some ten million dollars in variation margin during the fall of 1963 because the market had risen somewhat, would you as a member of the Board of Managers have shut down the Produce Exchange on November 14th, cut across contracts, terminated them without delivery and deprived the shorts of any opportunity to profit in the decline of the market?

A I don't know what I would have done.

Q You said, sir, that one of the things as a hypothetical member of the Board of Managers you would have done, at some point during the fall of 1963 or perhaps a little earlier would be to ask the members -- you were going to ask the Clearing Association but then I think we agreed you would ask the members what positions they represented for their various customers?

A Yes, this would be a way of compiling the market position of the various traders.

Q And that is a rather extreme step to take, is it not, sir? This is something that causes lots of rumors and questions in any commodities futures market as

to why this is being done.

A The circumstances were such that they were overriding and would require me to take that step.

Q Wouldn't you agree that whatever steps should be taken should be done in the most diplomatic careful way that it could be done in order to allay fears and not arouse any panic on the part of anybody in the market?

A Again, I think that depends on what the situation was in the market and how critical it was when I made my investigation and got my information.

Q And isn't a sensible thing to do, in your opinion to those conditions that were revealed on November 14, 1963 in the New York Produce Exchange, to attempt in a very prompt manner, to work out a voluntary liquidation of positions to reduce the concentration of the open interest by getting members to agree to take on some of the Allied position?

A Again, I think there are many actions that one could think up.

Q Isn't that a good one to think up?

A But, at this point I think I would not be prepared to say what I would have done.

Q Do you know how long it took the New York

of having only been a hypothetical member of the Produce Exchange. You were never an actual one?

A That is correct.

Q May I understand, have you been an academician all of your professional life?

A No. I was farming with my father for five years. Then I was in the military service for four and a half years.

Q After you got your degree, have you been an academician since then?

A Yes. I have had a couple of leaves of absence but I have been essentially in the academic world.

Q Do you teach a course on how to conduct an investigation of a potential manipulation?

A No, I don't teach such a course.

Q Have you written any papers on how a board should go about conducting an inquiry?

A No.

Q Do you teach a course on what the appropriate practices of a brokerage firm are in the commodities field?

A No.

Q Have you written any papers on that subject?

A No, I have not.

Q Am I correct, your real specialty is economics?

hprf 2

5937

MR. MINNEROP: That is correct, your Honor. In order to accommodate Professor Farris we have reached a stipulation which I would like to now read t the jury.

The plaintiffs and the defendants have stipulated and agreed that Professor Farris, if continued as a witness would have given the following testimony.

One. As to volume of trading on the New York Produce Exchange, that Ira Haupt & Company was at all relevant times in the position to determine what the total volume of trading was and by reference to its own books and records what portion of that total volume was done by Haupt acting as broker for Allied.

Two. As to the open interest that Ira Haupt & Company was at all relevant times in the position to determine what the total open interest was, and by reference to its own books and records what portion of the total open interest it was carrying for Allied at any given time.

Three. As to commitments of traders that Ira Haupt was at all relevant times in the position to determine what the total open commitment of large traders was as reported by the CEA and by reference to old books and records what portion of that total

hprf 3

5938

commitment it was carrying on behalf of Allied.

Four. As to the number of deliveries on the Exchange, that Ira Haupt & Company was able to determine at all relevant times by reference to its own books and records how many deliveries were being made or accepted by Haupt acting as a licensed broker.

Five. As to the number of ex-pit transactions Ira Haupt & Company was at all relevant times in the position to determine by reference to its own books and records what the number and size of ex-pit transactions were which allied engaged in with Haupt acting as broker.

Furthermore, Professor Farris would have testified if asked that he didn't read the testimony of Harry B. Anderson in connection with his appearance here.

Finally, Professor Farris would have confirmed if asked that as of November 14, 1963, there were approximately six weeks left until all of the open December contracts had to be settled.

Thank you.

MR. HARRIS: We would like to recall Professor Gray, at this time, your Honor.

hprf 4 [5939]

ROGER GRAY, recalled to the stand as a rebuttal witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q Professor Gray, I would like to show you Defendant's Exhibit 1-A which is an unsigned undated report of the Commodity Exchange Authority and ask you if you have seen that report before, sir.

A Yes, I have.

Q And since the last time you testified here, Professor Gray, have you at my request studied that report?

A I have.

Q Professor Gray, this report, Defendant's Exhibit 1-A, attributes the rising price of cottonseed oil futures contracts in the fall of 1963 to rumors and speculation about the Russian purchases of wheat and there were rumors they would purchase oils as well.

I would like to direct your attention to page 3 of the report at which at the bottom of the page there is a quotation from the Fats and Oils Situation report issued by the Department of Agriculture on

November 12th, in which is quoted or there is a reference to speculation that the Soviets and other Eastern Block countries may enter the U. S. market for fats and oils.

Do you see that?

A Yes, I do.

Q Professor Gray, to your knowledge was this speculation that the Soviets and other Eastern Block countries would enter the U. S. market for fats and oils manifested in the cotton futures oils?

Q It was very clearly not manifested in that market. If we mean by speculation taking positions in the market because during the period of time referred to here virtually everyone in the market other than Allied was either reducing its long position or adding to its short position.

If we mean idle speculation or gossip or talk, conceivably there was some such, but this was not manifested in marketing activities.

Q Professor Gray, if you turn your attention to page 20 of the report, the top paragraph which is actually carried over from page 19, or actually from page 18, since page 19 has charts on it, there is an analysis or reference to positions of Allied Crude and soybean oil futures as compared to cottonseed oil futures and then the CEA report has the reference as to Allied would have to dominate both Allied --

MR. O'DONNELL: Objection, your Honor. This portion was not to be read.

MR. LIMAN: I have another objection. If he wants to quote to Professor Gray let him quote the first statement he made as to what the CEA attributing somethings to, is a question I don't subscribe to. I don't think he is doing the same thing

here.

MR. HARRIS: I am quoting.

MR. LIMAN: You took a word or phrase.

THE COURT: Well, the point is, as I understand it, based upon your objection the defendants read, I think, this portion but were required to delete references to the other oil and I don't see based on your objection that you are now going to ask him --

MR. O'DONNELL: Actually this portion was not read, your Honor.

MR. HARRIS: Well, the report is in evidence.

THE COURT: Every other portion that we allowed to have read, that was done.

My understanding, of course, was that although the exhibit was submitted, that the portions which the defendants read were the portions which in fact they were submitting to the jury for consideration.

MR. HARRIS: I think I am entitled, your Honor, to have Professor Gray comment on the entire report rather than --

THE COURT: You obviously are. If you want to submit the entire report, you are entitled to that. But if you are going to do that you are also going

to have to abide by the rules which you have set down in regard to what portion of the report can go in. It is based on your objection that any reference to the other oils is not before the jury, Mr. Harris.

MR. HARRIS: The paragraph I want to read, the sentence I want to read talks about dominating not one but both oil markets. I don't think that that necessarily goes beyond what was read. There were references to oil markets in the reading that Mrs. Kaye did to the jury, your Honor.

MR. LIMAN: He can't do it that closely. It seems to me if Dr. Gray wants to comment on the whole report that's one thing but to take a phrase doesn't seem to me to be appropriate.

THE COURT: I think he is entitled to bring out certain portions, any portion he wants Professor Gray to comment on. But, I don't believe he is entitled now to introduce intothe record parts of the report which, based on his objection, at least in the defendants reading, I have excluded so that the report, as I understand your objection, any reference to soybean, you have to deal with the report confined to cottonseed oil.

MR. HARRIS: Of course my point in making

the objection, your Honor, the report integrally relates to cottonseed oil soybean and my objection in keeping it out of the case, I don't think this report makes any sense because --

THE COURT: Mr. Harris, you are now attempting to rationalize your effort to get around to the objection which I sustained the other day. Let's proceed.

Q With reference to paragraph 20, Professor Gray --

THE COURT: Page 20.

MR. HARRIS: I'm sorry, page 20, the first paragraph.

Q Do you agree with the CEA's statement that in order for Allied Crude to effect or attempt to raise oil prices to artificial levels -- and let's talk about cottonseed oil prices -- that it would have to dominate not only the cottonseed oil market but other markets as well?

A No, I do not agree with that. I think that the word dominate in this context is entirely too strong when one's concern is with an artificial influence on prices.

Certainly without dominating the cottonseed oil market, you could have it influence and an artificial influence on cottonseed oil prices. I would only extend that, that that statement would carry in spades with reference to other markets.

It is true that you wouldn't even need to dominate the cottonseed oil market in order to artificially influence prices.

Q Professor Gray, further down on the same page, 20, the CEA states that ex-pit transactions do not have a price effect on futures prices.

Do you agree with that conclusion?

THE COURT: Where is that?

MR. HARRIS: The paragraph starting with "Price is a function of trading."

THE COURT: All right.

A I do not agree with that conclusion, and the ex-pit transactions that we are concerned with here in my opinion were done in order to, among other things, enable Allied to maintain its long futures position and even to build up its long futures position. In maintaining and building up its long futures position, it maintained its artificial effect upon the prices.

Q In this report, as you have seen it, does the CEA make any attempt to analyze the effects of the ex-pit registered warehouse receipt financing transactions that you have testified about when you were last here in connection with their, as you indicated it, assisting Allied to maintain its long position in this market?

A Well, there is reference to these ex-pit transactions in the footnote which I shall hopefully locate on page 27, and quite appropriately there the CEA puts the word transactions in quotes, clearly indicating that they question whether these were real transactions, and in the covering memo that accompanied this there

is reference to the fact that they had deleted from this footnote reference to the question whether these were bona fide transactions or not.

In an earlier version of this paper they had raised that question.

So it seems to me manifest that they entertained doubts as to the legitimacy of these ex-pit quote transactions.

Q Professor Gray, Turning to page 24, the end of the paragraph immediately preceding the subheading in the middle of the page.

Do you see that, sir?

A Yes.

Q The CEA concludes that Allied had heavy competition from other traders during the period that they were looking at, which is July 1st to November 22, 1963, which mitigated against it dominating the oil market.

MR. LIMAN: Oil markets plural.

MR. HARRIS: I'm trying to restrict myself to cottonseed oil.

MR. LIMAN: Your Honor, this shows the falsity of it.

He asks him to comment on a conclusion of

the CEA which refers to two markets, but he takes out the two markets, makes it one, and, therefore, he takes away the thrust of what the CEA was saying on this.

I object to that. He made the objection. If he wants to pursue it, then he can't stand on his original objection on this.

MR. HARRIS: I was about to ask Professor Gray to address himself to the cottonseed oil market.

THE COURT: I think I'm going to verrule the objection.

A May I have the question read back, please?

Q Let me rephrase it then.

Do you agree with the conclusion that Allied had heavy competition from other traders during the period July to November 1963 that mitigated against its dominating the cottonseed oil futures market?

A No, I don't agree with that conclusion. If in the first instance we are talking about competition for buying cottonseed oil futures, that competition was virtually eliminated during that period of time, even if -- and I don't know how to construe their own connotation of the word competition right here -- but even if they are taking that to include the sellers in the market, even the selling side of the market was relatively concentrated during this period.

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gr1 Gray-direct [5949]

In that regard, Professor Gray, on page 22, the first full paragraph on the page the CEA notes that the bulk of the long side of the cottonseed oil futures market in the fall of 1963 was held by Allied and that the short position was held -- when you get to November 15 the last sentence of that paragraph indicates that processors held over one half of the short positions.

In that connection I will ask you to take a look at Plaintiff's Exhibit 1 in evidence, which is the report handed by the CEA to Mr. Berg on November 14, which indicates the people who held the long and short positions of over 100 contracts on November 12, '63.

In light of the fact, sir, that in November, mid-November 1963 Allied held 90 per cent of the market on the long side, and there's approximately eight people listed on that report who hold the bulk of the short side of the market, would you conclude that that market was in a healthy condition?

MR. O'DONNELL: Objection, your Honor. The record shows to the contrary. The record shows that Plaintiff's Exhibit 1 speaks as of NOvember 12 and we know that by mid-November that DeAngelis' position had been reduced by 3000 contracts rolled forward.

MR. HARRIS: That's the near month.

THE COURT: The objection has to be sustained on another ground.

Professor Gray is not here to give us his views as he gave them to us in your case in chief. He's here I gather to give you his views about this report. And whether the market was healthy or not on November 15, that's not the question that is addressed to him. He should address himself to the issues of what has been raised in this report.

Q Does this report indicate whether the CEA believed the market was healthy or unhealthy as of that date.

MR.O'DONNELL: Objection, your Honor. It speaks for itself.

THE COURT: He can't tell about what the CEA believed. He can tell us what he believes.

Q Isn't it a fact that the CEA doesn't make reference to that, the healthiness of the market in this connection in its report.

MR. O'DONNELL: Objection, your Honor. It speaks for itself.

THE COURT: I don't understand the question.

MR. HARRIS: I'm trying to avoid having t

read the whole report, your Honor.

THE COURT: Mr. Harris, I can't deal with that.

MR. HARRIS: I think I am entitled to bring out that the CEA makes certain references and doesn't follow them up, and the witness can say he would have and he thinks that it's wrong.

THE COURT: If you want to have Professor Gray testify to anything, Mr. Harris, you ask proper questions and you may do it.

MR. HARRIS: Very well, your Honor.

Q Looking at that paragraph I just addressed you to, Professor Gray, at page 22, would you view the facts set forth there as significant in the context of an analysis or an investigation of cottonseed oil futures market in 1963?

A The facts that are set forth in this paragraph, would I view them as significant?

Q Yes, sir.

THE COURT: Beginning with the composition?

MR. HARRIS: Yes.

A Yes, I would view these facts as being significant.

The most significant fact here was that

Allied increased its position on the long side of the market. The statement that the traders were thus providing the contracts for the increased purchasing by Allied Crude during the September, November period -- the trader's name is sort of a self evident proposition, that there were a number of large processors, crushers and refiners.

What this doesn't say, which I would deem as also being significant, is, as I think I mentioned a few moments ago, the short side of the market was itself concentrated in relatively few hands.

Q Skipping down two paragraphs, Professor Gray, you will see that the CEA says, it is apparent from this lineup of traders in the cottonseed oil market that the industry was willing to accommodate Allied Crude by selling cottonseed oil at the higher prices prevailing in the September to November period and in doing so the cottonseed oil industry had the capacity to deliver the quantity of cottonseed oil in settlement of futures contracts which Allied Crude held on the long side of the market despite the size of its long position.

Do you agree with that paragraph, sir?

A Yes, I think that I do.

Q Does that material contained in that paragraph indicate to you that the market price was not artificial in the period September to November 1963?

A No, this paragraph is not relevant to that question or they are not addressing the question in this paragraph as to whether the price was artificial during that period.

Q Professor Gray, much of the CEA report -- would you agree with me that much of the CEA report is filled with comparison of prices between cottonseed oil futures and other commodities?

A Yes, it is.

Q And an analysis of the price movements in various commodities as compared to cottonseed oil futures during 1963; is that right?

A Yes, indeed.

MR. MINNEROF: I object to leading, your Honor. He's leading the witness all the way here.

THE COURT: All right, Mr. Harris.

Q Do you agree with the methodology and conclusions reached by the CEA in this price analysis?

MR. LIMAN: Your Honor, I would like to just simply state that I think that Mr. Harris is opening the door to the entire report when he asks the witness

whether he agrees with his conclusions as to price analysis and at the same time objects to letting in portions which deal with the sections that they are looking at.

MR. HARRIS: Your Honor, I think Mr. Liman's --

MR. LIMAN: I have no objection to it being covered, your Honor, but I just woudl like, so there is no claim thathe was misled, that if he asks questions like that, it seems to me that it appropriately opens the door to the matters that are covered here.

THE COURT: Do you want the whole report in?

MR. HARRIS: I think we have to, your Hoor. My point the other day --

THE COURT: So that your objection the other day, you prefer no longer to stand on it; is that right?

3A

elr1 Gray-direct 5955

MR. HARRIS: Yes, sir, I think that my objection the other day was going to the point that I think we are entitled because of this report to go into the soybean oil market as we attempted to do at various times during the course of this trial. I think that the CEA report, the whole basis of that report is to compare cottonseed oil with soybean oil. And I think it's been pointed out here that there is really very little I can have Professor Gray analyze if he is reinterrogated purely to cottonseed oil because then he can't get into the basis of the comparison.

THE COURT: Your responsibility for putting yourself in that posture. In any event, if you are now abandoning your objection, is that what I understand you to be doing?

MR. HARRIS: Yes, although I think we are entitled to go into Allied's activities in soybean oil in general.

THE COURT: No, you are not entitled to do that, so there is no use in making a point. You may be entitled so that in terms of this report, so that the jury may get, and Professor Gray will not be restricted in making a rational analysis of the report and indicate his views on it, but that is all. So

that if your objection is now abandoned, then you may proceed.

MR. HARRIS: Okay.

THE COURT: But only for the purpose, I am indicating, of that analysis of this report.

MR. HARRIS: I understand.

Q Professor Gray, I think my question was, do you agree with the price analysis made by the CEA in this report with regard to its comparison of cottonseed oil futures with other commodities, including soybean oil futures?

A Well, I certainly don't agree with the conclusions that they draw from comparing these prices. If you are restricting this to methodology, I think it's entirely appropriate to look at the relationship between cottonseed oil and other prices.

I am not at all familiar with any of the background materials that may have gone into this, nor in fact do I know who prepared this, nor have I discussed it with him.

But on its face I would reject the findings in a couple of particulars in their price analysis. I should say the first particular in which I --

elr3 Gray-direct 5957

Q Professor, perhaps before you get to the particulars, you ought to tell us what their conclusion is that you disagree with?

A Well, they have done -- they have drawn at least two conclusions in terms of price comparisons. They have, I would say that their major conclusion is that the prices of cottonseed oil cash and futures that they observe over this period and particularly the rather steep rise toward mid-November and the abrupt decline in mid-November, having traded this back first to the so-called rumors, the Russian rumors, etc., they relate this to a foodstuffs price index in an effort to explain this price decline in cottonseed oil in the same -- as being part of an overall decline in the foodstuffs price index.

The second price comparison analysis which they have used here is that between cottonseed oil and soybean oil, and they look at a long period, 30 years, if memory serves me, a 30-year price correlation that had been published by economic research service, or fats and oils division in 1971, and then we look at the shorter periods relevant to the case at hand.

Now, to take those perhaps in the reverse order, looking first at the latter of those two, they

elr4 Gray-direct [5958]

make considerable issue of the ostensible high correlation between soybean oil and cottonseed oil pri s, and that is what is presumably demonstrated at pages 4 and 5, and they show us in the text a set of correlation coefficients. They don't give us other information about this relationship.

One of the troublesome omissions in discussing that relationship is to be found really on casual visual inspection of the charts, namely that between the period of February or about the end of February through July or through the end of July, one sees that cottonseed oil prices strengthen throughout that period, reading from the chart one would have to say that over that period cottonseed oil prices strengthened by at least one half cent per pound, perhaps even more; whereas over the same time interval, soybean oil cash and futures prices declined, and again visual inspection from, say, end of February to end of February would show that soybean oil prices declined by perhaps a half cent.

If you have a change of one full cent in relationship thence between these two oils over that period of time , no such change in relationship is implied in the correlation figures that they give, they

give no attention in this study to that change of relationship, which amounts to approximately 10 per cent of the value of these commodities, and it would be my interpretation that they have missed there an opportunity to have discovered an artificial price effect being manifested in departure in these two series as the Allied activities were of course proportionately larger in cottonseed oil than in soybean oil.

As to the other part of their analysis which I think it is fair to say is the major thrust of their analysis, namely that what happened here in mid-November, while they in some paragraphs, they say this reflects the closing out of the forced liquidation of positions, they never really attribute that price action in November directly to the positions of Allied in the market and the liquidation of those positions.

The difficulty with their explanation that I find, this is part of the overall foodstuffs price decline at that point in time, is if you look at page 13 chart 4, and a superficial visual inspection would suggest that the mid-November decline in the all foodstuffs index was comparable to these mid-November declines that we see in cottonseed oil and soybean oil back in charts 1 and 2.

The charts are so constructed that the lines are about the same length. To the extent that one gets that impression, it's highly deceptive, because as a matter of fact the decline in the all foodstuffs index is drawn to a much different scale than that of the cottonseed oil and soybean oil prices, so that that mid-November decline in the all foodstuffs index amounts to approximately a 6 per cent decline, perhaps slightly less than 6 per cent, whereas the decline in cottonseed oil prices in chart 1 at that same mid-November period amounts to 21 per cent or more.

They have left themselves with an additional 15 per cent decline or more in cottonseed oil that isn't explained in this all foodstuffs index price decline.

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Q Turning to page 7 of their report, in the second paragraph from the bottom there is a sentence in the report that forced liquidation of cottonseed oil and soybean oil positions held by Allied -- and it goes on to give the dates and reflects in certain lower prices.

Do you agree that this 15 per cent differential you just referred to is attributable to the removal of Allied from the market?

A Most of that decline, without pinpointing 15 per cent, but most of the decline in prices of cottonseed oil and soybean oil prices was attributable to the removal of Allied's positions from the market, yes.

Q Can you explain why that is so, sir?

A Well, by this time Allied was owner of most of the long position in cottonseed oil, and it turned out that this was not a reflection of real demand.

Allied had accumulated an ever larger long position in cottonseed oil. Similarly, in absolute terms, an ever larger position in soybean oil, which was not proportionately as large in the soybean oil market, and neither of these were reflections of real demand. So when -- well, that being the case, then there is price artificiality being injected into the market as the

position is built up, and when you remove the price artificiality, the market collapses.

Q Professor Gray, turning to the top of page 24 after the first full sentence on that page, you will see the CEA concludes that Allied was a price factor in soybean oil futures, other long traders were as a group even more of a factor. And you will see back on page 23 a chart indicating that there were soybean oil, other long traders positions exceeded that of Allied.

Do you believe that that same sentence that I just read you is true with regard to the cottonseed oil futures?

A Well, excepting of course that it would have to be stated in the reverse with regard to cottonseed oil. I quite agree first that if that is the implication of this sentence, that Allied was a price factor in soybean oil and as a strict arithmetical proposition, other long traders had larger positions, though as a group they were more of a factor.

But using exactly that same reasoning, I would first say Allied certainly was a factor in cottonseed oil, and was a much more of a factor than other long traders as a group.

Q Now, Professor Gray, turning to the conclusions

that the CEA reaches, which start on page 29, looking down at the last clause -- well, sentence on that page, it says in light of these factors that they set forth, it is concluded that there were no artificial forces exerting undue declines upon cottonseed oil and soybean oil prices.

Do you agree with that conclusion, sir?

A No, I disagree with that completely. That sentence refers to the sentence just ahead of it, in which they have concluded that general market influences inflating the structure of all important commodity prices were the primary forces behind the commodity price movement prevailing during the period.

Then they go on to say, in light of these factors, it is concluded that there were no artificial forces exerting undue influence on soybean oil prices and cottonseed prices. I disagree with that, largely on the ground that I stated earlier, that you can't explain the prior level of cottonseed oil and soybean oil prices prior to the collapse, mid-November, nor the subsequent extent of the collapse in terms of this general commodity price or foodstuffs commodity price index.

Q Sir, skipping over to the next page in

the last paragraph, you will see that the CEA notes that in the fall of 1963 there were larger than normal supplies of both soybean oil and cottonseed oil and the prospect of a record soybean crop. Do you see that?

A Yes.

Q If that were the only fact you knew, sir, would you expect prices of cottonseed oil futures to be going up or down at that time?

A Well, I would expect them to be weakening in reflection of the larger than normal supplies; to the extent that traders recognize the situation.

Q The CEA goes on to say, in view of these supply and demand conditions it is not reasonable to believe that an oil firm as experienced as Allied would attempt to corner the market or attempt to manipulate oil futures prices during the season of peak availability of supply. Do you agree with that, sir?

A Well, the way that is phrased, I don't know whether the CEA was in a position to know what is reasonable to believe that Allied Crude would do. I don't know how they would judge that. Without disagreeing whether it is reasonable to believe that they would, I guess my position would be that the CEA should be ascertaining the facts as to whether they did it or not.

elrf 5 Gray-direct 5965

Q Is there any indication in this report that the CEA investigated Allied's intent in connection with trading in cottonseed oil futures in 1963?

MR. LIMAN: I object to that question. The report speaks for itself. If he knows whether they investigated the intent, I am willing to have -- I have no objection, I am willing to cross examine him on that.

THE COURT: All right.

THE WITNESS: Shall I answer, your Honor?

THE COURT: I think Mr. Harris is reframing the question.

That is why I said nothing.

MR. HARRIS: To save time, your Honor, I would like to do it as a hypothetical.

Q Assume with me, Professor Gray, that there is no reference to intent of Mr. DeAngelis with regard to cottonseed oil futures trading during 1963 in this report; do you believe this report is a sufficient investigation of the CEA to determine whether Allied was attempting to manipulate or manipulated the market price of cottonseed oil futures in 1963?

A Well, I think that the report insofar as I must judge by the face of the report, not knowing what

underlies it, et cetera, I don't see indication that they pursued the question of Allied's intent; yet in the very final sentence of the report they conclude that Allied evidently had no such purpose, namely of manipulating.

Q And I take it, Professor Gray, if you had access to underlying data or access to the persons who wrote the report, you would feel that you were in a position to analyze this report even further, is that correct?

MR. LIMAN: Is that a yes or no question, your Honor?

MR. O'DONNELL: I object to it, your Honor.

THE COURT: I don't really understand what this whole question is. I really don't, I'm sorry.

MR. HARRIS: I will withdraw it.

THE COURT: Thank you.

Q Professor Gray, do you have any first-hand knowledge of when this report was prepared?

A I have none.

Q Do you have any first-hand knowledge about who prepared it?

A None.

Q Do you have any first-hand knowledge about the circumstances under which it was prepared?

A No.

Q Do you have any first-hand knowledge as to all of the data that whoever prepared this report looked at prior to having this report that is Defendant's Exhibit 1-A physically typed?

A I have knowledge of nothing other than what appears in the report.

MR. HARRIS: I have no further questions, your Honor.

MR. O'DONNELL: May I proceed, your Honor?

(Pause.)

MR. O'DONNELL: I will be longer, your Honor.

CROSS EXAMINATION

BY MR. LIMAN:

Q Professor Gray, welcome back.

A Thank you, sir.

It is nice to be back with you.

Q You said that you didn't know whether there was any inquiry by the CEA into DeAngelis' intent.

Are you not aware from your talks with Mr. Gittleman and from what you have read in this case that the CEA in the summer and again in September inquired of Allied as to whether it was hedged? Are you aware of that fact?

MR. HARRIS: I object to that.

A Yes.

Q You are aware, are you not, sir, that Mr. Gittleman stated that Allied had actual export commitments of each pound of cottonseed oil it was purchasing on the Exchange?

A So stated to the CEA.

May I elaborate?

Q Do you need to in order to complete that question?

A I think so because, counsel, maybe a straight yes or no answer which I have given could be misconstrued.

While I don't know the time at which this report was prepared, at the time that this report

was prepared I assumed that the CEA had a good deal better information than it got from Mr. Gittleman --

Q But the CEA was making a judgment when it said that it was not reasonable to assume that he would attempt to manipulate, it was making a judgment as to what could have been assumed at the time these events took place?

A That is not the way I interpret that statement.

Q Do you not interpret it as also an assumption that a rational man in a market which was flooded with oil would not attempt to manipulate? You don't interpret it that way either.

A Conceivably that way, but I would reject your first interpretation. It seems to me this sentence is in the context at the time this report was prepared and typed up.

Q I take it if you had been running the CEA, Doctor, you would have been able to, by cross examination of Mr. Gittleman in 1963, have developed the fact that he had forged export orders and that his intent was an elicit one?

MR. HARRIS: I object, your Honor. I think this is beyond the bounds of this report now.

I think we are back to talking about the issues

gwrf 4 Gray-cross [5970]

we discussed perhaps by Professor Gray and others during the course of the plaintiff's direct case, as to who knew what, when in 1963.

THE COURT: I thought you had indicated in the examination of Professor Gray that there was no evidence of the intent of Allied --

MR. HARRIS: In this report, your Honor. There is no mention in this report.

MR. LIMAN: I don't want to take the time of the Court. I can proceed. The question really was self-evident.

THE COURT: All right.

Q You disagree with the CEA's basic conclusions here? That is fair to say, am I correct?

A Correct.

Q Incidentally, did you make any study of the relationship between the price of soybean oil and the price of soybeans themselves for this period? Yes or no.

A I'm trying to refresh my memory so I can give you an appropriate answer.

I have not made such a study. I did pay considerable attention to that price relationship during a week in November, and I don't recall having looked

A It was a large part of my interpretation at

at it over the entire period.

Q Did you also pay attention to the relationship between volume, open interest and deliveries in soybeans versus cottonseed oil?

A Have I subsequently, do you mean, in connection with this case?

Q Yes, sir.

A I have seen data on volume and deliveries and open interest, et cetera.

Q You know in soybeans that the volume in '63 was three times what it was in '62, the open interest in the fall was about double what it was in '62 and the deliveries in November were six times what they were in '62?

A It seems likely. I don't remember where as of this moment, but that squares with my recollection.

Q And you knew that Mr. DeAngelis was not engaged in the soybean market, I'm not talking about the oil market -- the soybean market which is what we have been talking about in the last question? DeAngelis wasn't engaged in that market.

A I had no knowledge of his having been engaged in the soybean market.

Q With respect to the statement that you

disagree with the CEA's conclusions, can you tell me whether it is a requirement that people agree with your views in order to qualify as directors of a commodities exchange?

A I hope that the answer is self-evident. I will answer it that that is not a requirement.

MR. LIMAN: Thank you. I said I would be short.

MR. O'DONNELL: May I proceed, your Honor?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. O'DONNELL:

Q Mr. Gray, it has been pointed out to me that I seem to discriminate among experts. Some are Mr. some are Professor, some are Doctor. Which would you like?

A If you would like, Mr. MacDonald, you may call me Roger.

Q How about just Gray.

A Fine.

Q I will try Professor.

Did I hear you tell Mr. Harris with respect to footnote 8, which is on page 27 of the CEA report, that you had seen some earlier draft of this report?

A No, I did not say that I had seen an earlier draft. I saw a covering memo that accompanied the submission of this report. As I recall, this memo was from Mr. Caldwell, the administrator of the CEA, to Mr. Merrin, Assistant Secretary of Agriculture. In that covering memo he referred to that change having been made in this footnote.

Q The memorandum which you are talking about is a part of Exhibit 1-A, it being Mr. Caldwell's memorandum to Mr. Merrin of March 18, 1964; is that not correct?

A Correct.

Q And it begins, "Attached is a copy of our revised report on the investigation of Allied Crude"?

A Correct.

Q And so we can tell from this document, can we not, that the report was prepared sometime prior to March 18, 1964?

A Yes.

upon to testify about the new bill and his indications

Q Do you know who Mr. Callander was in 1963?

A I know that he was with the CEA. I have had correspondence with him over the years. I have forgotten his exact title.

Q Do you know what his position was at the CEA in 1963?

A I'm not sure what his position was.

Q Do you know what group he was with in the CEA in 1963?

A The reason I'm hesitant, Mr. O'Donnell, is that in those occasions that I have had to contact Mr. Callander, it was with requests for data, and I'm not sure whether he was in charge of the surveillance group or not. It would be my guess he might have been, but it's only a guess.

Q Where was he located in 1963?

A I think in Washington, D. C.

Q In Washington for the CEA in a responsible position which you think was surveillance?

A Yes.

Q Head of a department?

A I'm not sure, but probably head of a group or department.

Q Do you know who Mr. Robinson was in 1963?

A Yes. Again I can't give you his exact title, but I'm acquainted with him. I met him in 1963 and have seen him since.

I think at that time Mr. Robinson was in the surveillance group at the CEA, but I couldn't tell you his title.

Q Do you know that Mr. McMinn of the CEA -- you know who Mr. McMinn was?

A I believe he was the man at the New York Produce Exchange, the New York regional office.

Q Do you know that Mr. McMinn reported to either Mr. Callander or Mr. Robinson in 1963?

A I think I have seen references to such reports, yes.

MR. HARRIS: I assume this will be connected up to this document that we are dealing with, your Honor.

Q Mr. Callander was a competent man at the CEA in 1963 so far as you are aware?

A I would prefer not to pass jusgment on the competence of an individual with whom my only contact was to request information. I can't pass judgment on that.

Assuming that people who hold positions in

various bureaus and offices of the government are there because they are competent, then we grant him that, yes.

Q The same for Mr. Robinson?

A Yes.

Q Don't you know that Mr. Callander and Mr. Robinson had a lot to do with the authoring of 1A, this Exhibit 1A?

A I didn't know that.

Q Returning to this memorandum by Mr. Caldwell of March 18, 1964 with respect to this footnote 8 in the report which reads in the second paragraph of the footnote, "While these transactions may have been coupled with an understanding that the oil would be resold to Allied, nevertheless, the oil was available to offset the short positions in the December future which had been set up as part of the transactions betweenAllied and the individual purchasers."

Do you see that?

MR. HARRIS: I think to make the record clear it ought to be indicated there are quotation marks around the word transactions.

MR. O'DONNELL: Yes, there are.

THE COURT: All right.

A Yes, I see that.

Q Looking at Mr. Caldwell's memorandum of March 18, 1964 on page 4 he states with respect to this page 27 of this revised report as follows, "On page" --

THE COURT: You mean paragraph 4.

MR. O'DONNELL: Paragraph 4, yes, sir.

THE COURT: All right.

Q "On page 27 the number of the footnote has been changed from 7 to 8 and the first sentence of the second paragraph of the footnote" -- that's the one I just read -- "has been amended to delete the reference to transactions that may not have been bona fide."

Do you see that?

A Yes.

Q Doesn't that establish that the people who wrote this report, Professor Gray, came to the conclusion when they put out the report that the transactions were bona fide? Tha's why they deleted the reference to bona fide?

A That doesn't establish that in my mind in that --

Q All right.

A -- they still use the word transactions in

to effect the price. References to prices which quote

quotes, and I think they are giving still some expression of their misgivings about the bona fides of these transactions.

Q With respect to the subject of prices, you have told us that you have made no study with respect to prices yourself, correct?

A No independent study of the nature that we see here, of correlation analyses and so on.

Obviously I think, Mr. O'Donnell, by this time I have given a lot of attention to prices and price relationships.

Q Will you turn, please, to page 17 of this report with respect to cottonseed oil prices, and beginning with July 1, 1963 you see a price for cottonseed oil of $13.50; is that right?

A 13 and a half cents per pound.

Q 13 and a half cents per pound, I'm sorry.

A Yes.

Q And then as of September 13 that price drops to 11.95 cents; does it not, for a drop of 1.55?

A Yes.

Q If there were any stabilization of that price, the stabilization didn't prevent the price from declining, did it?

A It didn't prevent it from declining that much, that's correct. It may have prevented it from declining still further.

Q And then when we go to the next date, October 8. The price is changed this time to 13 cents and 36 points, for an increase of 1.41 points above the September 13, 1963 price, correct?

A Yes.

Q And so again whatever has happened, the price has fluctuated and changed upwards for this period of time, right?

A Yes.

Q Then going to the next date on the chart the price declines from the 13.36 points that it was on October 8 to October 24 where it is at 12.79 points, for a drop of .57 points.

Again whatever attempts there were at any stabilization did not succeed in keeping the price at the level it had been on October 8, did it?

A Correct.

Q And then we go from October 24 to November 13 when the price rises a cent and five points.

Do you see that?

A Yes.

"Q And isn't it also right that if prices vary

Q And so again the price this time was fluctuating upward.

Then from November 13 to November 14 you see a price decline of 19 points; do you not?

A Yes.

Q And from November 14 to 15 a price decline of 15 points?

A Yes.

Q And then on November 18 a price decline of 93 points?

A Yes.

Q Finally on November 19 a price decline of 25 points, the limit.

Those figures show, do they not, that the price was fluctuating at various prices from July 1, 1963 all the way to November 19, 1963?

A They show fluctuations to the extent that they show fluctuations, yes. I think that in an earlier colloquy between yourself and myself the point you were making was that the price variability in this year was considerably less than it had been in prior years.

Q I think the points you were making was that the price was stable during that period, but I won't argue with you.

Now, with respect to page 20 of the report where the CEA states -- at the top of the page, about three lines from the top -- it would appear that in order for Allied Crude to affect or attempt to raise oil prices to artificial levels, the firm would have to dominate not one but both oil markets, as will be shown later, this situation did not exist, based on Allied Crude's operations.

You are not trying to tell us here, are you, Professor Gray, that Allied did dominate the cash markets in either oil?

A No, I think my testimony was to the contrary in that I felt that it was unnecessary to dominate either/or both markets in order to influence prices. It came to the point in the cottonseed oil futures where Allied certainly had overwhelming dominant position in the futures market.

Q But you agree that Allied did not dominate the cash crop with respect to cottonseed oil?

A Yes, I agree.

Q And that being the case, the shorts could

furnish oil to Allied in satisfaction of contracts to their heart's content?

A Whether to their heart's content, I'm not sure. Leaving out that aspect of it, they could have furnished some oil to Allied on delivery, yes.

Q With respect to these charts with respect to price movements in Exhibit 1A, and I am referring to the ones on page 4 and page 5 of the report which you told Mr. Harris about, the first chart relates to cottonseed oil and runs from October 1, 1964 to December 31, 1973, does it not?

A That is correct.

Q And the lines at the top of the page have to do with the prices of the cottonseed oil futures market and the ones at the dotted lines at the bottom have to do with the cash price, is that correct?

A Correct.

Q And then when you turn to the next page you find with respect to soybean oil futures, do you not, and cash --

A Yes.

Q -- there with respect to the same period of time?

A Yes.

Q Isn't it clear to you, Professor Gray, that with respect to the futures prices of the two oils, that they virtually paralleled each other in ups and downs during that entire period?

A No, I wouldn't say that --

Q Well, you could lay one on top of the other and see that, couldn't you?

A I pointed out a few moments ago, Mr. O'Donnell, that there was from February through July a decline in soybean oil futures prices and a rise in cottonseed oil futures prices, both significant. I just can't agree with you that that is parallel.

Q With respect to the conclusions of this CEA report, I understand that you don't agree with the conclusions on page 29, is that right?

A That is correct.

Q Of course, the CEA report -- the CEA wrote that report at the beginning of 1964 or sometime prior to March 18, 1964, and it was on the scene at that time and you were not, is that correct?

A Correct. I was not on this scene.

Q So you were looking at these conclusions, now you are looking at them only from the benefit of your hindsight, reading?

A Yes.

Q You were on the scene to some extent, as we have already estabslished, you remember you wrote that article, futures market and the commodity trade, which is Defendants' Exhibit 209 in evidence, we figured out sometime between November, 1963 and November 1964; do you recall that?

A Yes.

Q And you said there, did you not, "Thanks partly to self regulation and enlightened supervision by the Commodity Exchange Authority, but thanks mainly to a safety feature which is unique in business organization, a greater dollar volume of business is conducted in commodities future with less litigation or default than in any other form of commerce."

A Yes.

Q That statement was your best information about the CEA and its work at that time,was it not?

A Yes, that was my overall impression at that time, correct.

Q At that time your best judgment was that the debacle was attributable to the degree of brokers and not to the CEA's failure to take any action, isn't that right?

A It was a large part of my interpretation at that time, yes.

Q In fact, let me show you another document here -- mark this with the next defendants' exhibit number, please, for us.

(Defendants' Exhibit 215 was marked for identification)

THE COURT: Before we get into that, why don't we take our break now.

(The jury left the courtroom)

(Recess)

(In open court, jury present.)

Q Professor Gray, with respect to Defendant's Exhibit 213 for identification --

MR. HARRIS: May I see a copy of that, Mr. O'Donnell?

MR. O'DONNELL: Yes. May I look at it with you?

Q You recognize that document as a statement or memorandum presented by you back on June 15, 1964?

A Yes, I do.

Q And that statement was prepared by you in connection with your economic analysis of a bill to amend the Commodity Exchange Act, was it not, sir?

A Yes, sir.

MR. O'DONNELL: I offer it in evidence.

MR. HARRIS: Your Honor, I object to this, first, because this is the first time I have seen it and I haven't had an opportunity to review it adequately, and secondly, because I don't see what it has to do with the CEA report, which was the subject of Professor Gray's direct testimony.

MR. O'DONNELL: It has to do with the CEA, your Honor, if I may direct your attention particularly to the Allied situation, if I may direct attention

particularly to the paragraph on page 6,and also to the last sentence of the -- last two sentences of the paragraph on page 7, the long paragraph on page 7. There are other portions of the memo also.

THE COURT: I will allow you to question him about those views that were expressed here.

MR. O'DONNELL: Thank you. Shall we mark it in evidence?

THE COURT: Yes, mark it.

(Defendant's Exhibit 215 received in evidence.)

MR. HARRIS: Your Honor, I think we were entitled to be furnished with copies of these things. I have no way of being really able to respond to this thing. We had rules that went on about providing each other with copies. This is not the first time this has happened with Professor Gray. I didn't make a big point of the last time, but now I think this is unfair to the plaintiff.

THE COURT: I haven't had a chance to read the matter, but it appears to me Professor Gray testified about in part about what is included in that document in any event on direct, on his case in chief. As I understand it, it is his testimony when he was called

upon to testify about the new bill and his indications of his problems with some of the provisions. I think he went into that at length.

MR. HARRIS: Yes, he did, your Honor.

THE COURT: This is the first time in the course of what purported to be his testimony in writing has been before us. If you want to have an opportunity to read it and question him about it, I am obviously going to give you that.

MR. HARRIS: That is what I am asking about, your Honor.

THE COURT: Of course. If we have to -- I will give you time to absorb it and therefore question Professor Gray about it.

MR. HARRIS: I may not have to. It is just a question of not knowing because I haven't read it.

MR. O'DONNELL: Perhaps I could read the portions to the jury. Would that be satisfactory, your Honor?

THE COURT: It seems to me that that isn't satisfactory in terms of -- it is not satisfactory in that regard. You can read it, but I certainly think Professor Gray is entitled to respond. And secondly, I think that Mr. Harris is entitled to ask

Professor Gray some questions about that, once he has had an opportunity to read the document. So if anybody else has a copy of it --

MR. LIMAN: I have.

THE COURT: Mr. Liman, you don't need yours. Why don't you give your copy to Mr. Harris. Professor Gray certainly needs to have a copy while he is being questioned about it.

Q What is the exhibit number before you there, Professor Gray?

A 215.

Q The statements you made in this Defendant's Exhibit 215 were the best information you had at the time, were they not, sir?

A Yes.

THE COURT: When were they made?

MR. O'DONNELL: June 15, 1964, your Honor.

Q This memorandum or statement was an economic analysis on a bill to amend the Commodity Exchange Act; was it not?

A Yes.

Q Directing your attention to page 6, the first paragraph, where you state, beginning with the second sentence, referring to some popular misconceptions:

"The first of these is that the infamous fraud perpetrated by Allied Crude Vegetable Oil Refining Corporation was facilitated by low margin levels or would have been prevented by higher margin levels."

That was the popular misconception that you were addressing in this paragraph; was it not?

A Correct.

Q Then you continue --

THE COURT: Wait a minute, Mr. O'Donnell.

The only purpose that I was allowing that document in at this point is in connection with Professor Gray's testimony about this Exhibit 1-A and also you are allowed to attack the views that he expressed about it.

MR. O'DONNELL: That is all I intend to do, your Honor.

THE COURT: I have a problem with what you have just read.

MR. O'DONNELL: That was preliminary to this sentence.

THE COURT: All right.

Q The next sentence is, "Most of the fraud it should be remembered was accomplished off the futures markets, whereas higher margin levels would not have prevented the imaginations that did encompass the futures markets."

That was your best judgment in June 1964, was it not, sir?

A Yes.

Q With respect to page 7, sir, the final two sentences of the first paragraph read, "While it is true that futures markets have an extraordinary absorbative capacity, it is quite normal for large purchases or sales

to effect the price. References to prices which quote would otherwise prevail quote taken apart from reference to abnormality or artificiality is too onerous a criterion of manipulation."

When you wrote that, that represented your best judgment at the time, did it not, sir?

A Yes, it did. It still does, I might add.

Q Turning to the first page of Defendant's Exhibit 215 and the second paragraph on that page, you state in the last two sentences, "It is possible through intensive study of the facts to say in retrospect, underscoring retrospect, whether price change was warranted. Because it is not possible to say this in advance, underscoring advance, we have futures markets where differing opinions of prospective price changes can be reconciled."

Did that represent your best judgment at the time, sir?

A Yes.

Q Turning to page 3 of this memorandum,the first full paragraph in the first sentence reads, "Excessive speculation can cause unwarranted price change on occasion, but if it is impossible to anticipate unwarranted price change, it is likewise impossible to

anticipate excessive speculation."

Did that represent your best judgment at the time?

A Yes.

Q Turning to page 4 of this memorandum, the second full sentence at the top of the page, "The proven antidote for overspeculation, manipulation or other attempted trading evils is the price defense thrown up by others in the marketplace who detect and defeat such efforts."

Did that represent your best judgment at the time?

A Yes.

Q You told Mr. Harris, Professor Gray, that during some period of time there was a price decline of half a cent and a price upswing of half a cent, about half a cent; is that right, on the cottonseed oil market?

A I was drawing the contrast between cottonseed oil and soybean oil, and over an interval of time, late February to late July, I said there was a price rise in cottonseed oil and a price decline in soybean oil.

Q Do you recall giving this testimony when you were here before:

This is at transcript page 4640.

"Q And isn't it also right that if prices vary from the normal on a few days, that this isn't competent evidence in your view that there is any artificial or arbitrary prices being established?

"A That variance in and of itself certainly is not competent evidence.

"Q In other words, prices have to be viewed in prospective over a period of time, do they not?

"A I think all of the surrounding circumstances would have to be viewed, yes.

"Q And the fact that the prices go up or go down on a particular day or in a particular week doesn't by itself clue you in any way to any arbitrary or artificial forces at work with respect to the commodity; is that right?

"A That is right."

Do you remember giving that testimony?

A Yes, I do.

Q Do you confirm that again today, do you?

A Yes, I do.

Q With respect to this CEA report, Exhibit 1, you do agree with certain conclusions of the CEA in this report, do you not?

A Certain of the conclusions?

Q Yes, sir.

A I think that I do, but I would like --

Q For example, there was no corner or squeeze of the market?

A Yes, I would agree that there was not a corner or a squeeze of the market.

Q And you also did not take issue, did you, with this paragraph on page 22 of theCEA report reading in the middle of the page, "It is apparent from this lireup of traders in the cottonseed oil market that the industry was willing to accommodate Allied Crude by selling cottonseed oil at the higher prices prevailing in the September, November period and in doing so cottonseed oil industry had the capacity to deliver the quantity cottonseed oil in settlement of fugures contracts which Allied Crude held on the long side of the market despite the size of its long position?"

You agreed with that, did you not, sir?

A I think I agreed with that. I don't recall whether I had earlier agreed with it.

Q With respect to the conclusions on page 30 of the report, you told Mr. Harris with respect to this sentence, "In the fall of 1963 there were larger than normal supplies in both soybean oil and cottonseed oil

gwrf 7 Gray-cross [5990]

and the prospect of a record soybean crop" -- you said that represented to you that that should have an impact on prices you would assume of weakening those prices.

Do you recall that?

A Yes.

Q If you further assume, however, that despite the record soybean crop and the fact that the supplies of both soybean oil and cottonseed oil were larger than normal, if you add to those facts a fact that there was a lot of export business and a larger demand for the oil than ever before, then the weakening effect that you were talking about would be discounted by the greater demand; would it not? It was always supply and demand.

A If one were to add for that period of time increased export business, then your hypothetical I would have to answer in the affirmative. But my impression is not that there was increased export business during that period.

Q You know that 1964 was a large export year, do you not?

A Yes, I'm aware of that.

MR. HARRIS: Objection. What does that have to do with it?

THE COURT: I agree.

Q Do you recall giving this testimony in Cargill, Professor Gray? This is a transcript page 3357 and 8:

"Q You have stated as your opinion, Professor Gray, that the prices of wheat, both the futures and the cash in May, for cash May 20th and May 21, 1963 and futures May 20th and 21, 1963 were not artificial or arbitrary. In reaching this conclusion did you consider the fact that the cash price was not sustained but as shown here fell off sharply, was evidence of either artificiality or arbitrariness?

"A No, I did not. I did adjust myself a little earlier in" -- I suppose it means "address myself a little earlier in my testimony to the testimony of how I would have recorded the timing and rate of that decline, but even doing it as a precipitous decline following the last day of trading, I would not have taken that as an indication that the price level which had been reached on the last day was artificial or arbitrary."

Do you recall giving those answers to those questions?

A Of course not as to the specifics. It has been a number of years ago. I recall such testimony,

indeed.

MR. O'DONNELL: Your Honor, that completes my cross examination.

I have one loose end here which I would like to offer, if I may. It is Defendant's Exhibit 7, which is the application of Ira Haupt for registration under Section 69 of the bylaws of the New York Produce Exchange as of August 14, 1963.

THE COURT: We can do that after we have finished with the Professor.

MR. O'DONNELL: That is all I have, your Honor.

MR. FRYER: I have a very few questions, your Honor.

CROSS EXAMINATION

BY MR. FRYER:

Q Professor Gray, I would like you to look at page 7 of Defendant's Exhibit 1. If this question has already been covered, I apologize.

Specifically the first sentence of the first full paragraph on page 7 which says, "The price decline from July 1st until September 13th of 155 points in cottonseed oil"-- you don't disagree with that statement with respect to the decline in the price of cottonseed oil, do you?

THE COURT: What are you talking about? You have to read the sentence so we can understand it.

Are you talking about what that sentence says or the fact that there was a decline?

MR. FRYER: I'm asking him if he argues with the statement that there was a decline of that amount during that period.

A I, of course, don't disagree with the assertion that there was such a price decline.

As to what it reflected, larger stocks of oils accumulating in that period, I would want to disagree only to the extent of saying that I seriously doubt that this price decline occurred only in reflection of that.

Q Would you say that the decline of 155 points is a substantial decline in the price?

A Well, we are back for the third time I believe in my testimony here to the question of how we define substantial.

Q What kind of a decline would you call it?

A Let me simply say that 155 points is more than 10 per cent of the price of cottonseed oil, 130 points is more than 10 per cent of the price of soybean oil and that is a signficiant price change, yes.

elr7 [6019]

I am going to grant plaintiff's motion in respect tothe counterclaim and dismiss the counterclaim of the New York Produce Exchange.

I have examined the record, and on the basis of this record I don't think that any claim can be sustained. My problem in regard to the plaintiff's cause of action is that I am hovering in the back of my mind, or rather in my mind is the same feeling that the plaintiff hasn't established causation. But my problem has been, ladies and gentlemen, that I have not b een able to examine the record with the care that I would want to before I render an opinion on that, and I am finding, as I think that you must have realized that the development of what I would regard as a satisfactory charge to the jury is much more, in this case, somewhat more difficult than I had contemplated, and I have had to do one of two things:

I have had to abandon the search of the record for the plaintiff's claim, and concentrate on the possibility that I had to charge to the jury.

All I can do isreserve decision although as I had indicated, there is doubt in my mind on it. But I will have to reserve decision about it, and the matter will go to the jury on the issues of the plaintiff's

6020

elr8

case.

MR. LIMAN: Your Honor asked for an agenda for this afternoon. There are some pieces of evidence that your Honor admitted when Continental was in the case which plaintiff hasn't connected up with Vogel, some pieces of evidence which he admitted similarly on his theory of vicarious liability, for example, a guarantee, and I would ask your Honor, though I can't come through this record and move to strike every piece, there are certain central things which I can cover and which I could state now --

THE COURT: Will you be prepared to do that this afternoon?

MR. LIMAN: I could state that now.

THE COURT: All right.

MR. LIMAN: One is the testimony of DeAngelis and Gittleman of conversations with Mr. Totah and Stafford. There isn't much of that in the case of Continental, because whatever there is clearly wasn't connected up with Harold Vogel.

Secondly, while I understand that the ex-pit records are a basis of Dr. Gray's testimony and therefore sort of sit there as a foundation for what he has said, they have not been connected up to Mr. Vogel

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elrf 6

that with the benefit of that information and as Mr. Liman says, with an extra day that perhaps you could return to, rather than abandon my favorite subject of a directed verdict, rather than turning to the requests to chart, and I would hope that this afternoon or tomorrow, if we could take an extra day, that as Mr. Liman says, it might be the most expeditious course for the litigation.

THE COURT: Gentlemen, my problem, as I said with this, is that I am fearful that it is going to take longer than that. I can certainly -- I don't believe that marshaling the evidence in the way that I had planned to do it is going to really going to be that difficult. I am merely proposing in terms of marshaling the evidence is posit what the contentions of the various parties is in the light of what I think has been revealed by the evidence.

What I feel I am required to do to be certain of the motion for directed verdict, which I must say I am three-quarters certain already, as you well know, is going to require analysis of the record that I just can't deal that I can do in any short time and also is going to require a very long opinion on my part, which of course I am prepared to do that, and I may have to do that anyway.

But the point is that I am -- I will have to

go over the record, and I had started it, and I got to the point where I thought I could do both of them. But the charte, in making it an intelligent charge and also in making up my mind about how I should state Haupt's responsibilities in this case, has caused me some conceptual problems, and I think I have more or less resolved them, but it really took me until last night to do it.

At least to my own satisfaction.

I doubt that I am going to please counsel, but at least to my own satisfaction. And I just can't -- I don't feel that I can do justice to any of you by doing this. The only thing I really feel I can do is do as I suggest.

The problem of course is that if this case had been a shorter case, I think that on this basis I would have been prepared to have thrown it out. But it is long. I don't think the plaintiffs have made a case, frankly. But I think that I have to look at every piece of document in the evidence to be certain of that, and I would have to write an opinion in that regard to be of some help. Obviously this case is not going to end here. I have put my views on the record, frankly.

elrf 5 6045

a duty on the part of Haupt, there was a duty on the part of the Exchange and the duty of self-regulation initiates there. It is up to the jury to determine whether or not the assurances or the failure of the authority to become excited at the time when the plaintiff said the Exchange should have become excited, to whether or not that is something that gives you reason, acting as reasonable men, to do as you did, and it seems to me that is the picture.

The substance of the next one, Haupt, not the proper cause of injury --

MR. SMITH: I don't think you gave us a ruling on the previous one.

THE COURT: I said I will give that in substance. Haupt not proximate cause denied. Reckless conduct, denied. Fiduciary denied. I am denying all of it due to the disclose, except that I do think that the last paragraph on the first page, that if the jury finds that any member of the Board had information which was material to effect the function of the Exchange and failed to disclose that, that then they may find that that defendant failed to act reasonably under the circumstances. That is all of that one.

elr4 6097

So the message is, the signs were consistent with the commercial logic of the situation. Only some 20-20 hindsight expert looking at the situation now, when DeAngelis and Haupt had gone down the drain, can read some danger in the signs.

Now, let's turn to -- so much for the warning signals. Let's turn to what the answer is to Professor Gray's thesis in 1965 that there must have been a manipulation or attempted manipulation in 1963 because of support of the market or buying at the close.

The short answer to that is the Commodity Exchange Authority investigative report, Defendants' Exhibit 1A in evidence, which I'd recommend you might wish to take into the jury room with you, it's a report, chart after chart, price charts, other charts, of what went on in this market in 1963. And conclusions begin at page 29 and continue over to 30.

There is some other valuable information here that you may take time to read. But the conclusions of this government agency, after this thorough going investigation, which is represented by this document, it is apparent from the size of the soybean oil market that Allied was in no position to corner that market, or

elr5 [6098]

squeeze the shorts.

It therefore did not have a corner of the cottonseed oil market. Consequently, Allied did not have control over the December, 1963 cottonseed oil futures and therefore was not in a position to squeeze the shorts.

It is not reasonable to believe that an oil firm as experienced as Allied Crude would attempt to corner the oil markets or attempt to manipulate oil futures prices during the season of peak availability of supply.

In our analysis of Allied Crude's operations during this period, we found no evidence which would indicate that the firm built up its long positions in the futures market for any such purpose.

Now, Mr. Harris says well, there was some buying at the close. Well, I submit to you that the buying at the close, there is buying all day long. There was buying in the morning, there's buying at the close. There is also selling in the market, afternoon and at the close.

And all of this activity is done in full view of the CEA representative on the floor at the time of the close, Mr. McMinn told you. And he saw

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6102

Mr. MacDonald had none. Mr. Berg certainly was a full time employee. He was sitting right there for the purpose of observing what was going on. So that the lack of testimony of complaints and the testimony of the eyewitnesses, I submit to you, demonstrates that there was no manipulation going on or attempted manipulation that anybody could see back in 1963 or that went on.

The CEA report says there is no evidence of it. You saw these men that I am talking about, on the witness stand. You saw Mr. MacDonald. You saw Mr. Fashena. And it is for you to decide upon their credibility as they testified, how they answered the questions on direct examination, how they stood up under cross examination.

I think it is ironic those men should be singled out. I think if anything they should be singled out. So the long and the short of that is that all of the witnesses that you had before you around the Exchange back in 1963 saw nothing wrong with respect to the trading there. You know, the marketplace is a great resolver of attempted manipulation. I suppose if I go into the market and try to buy something, I may be trying to manipulate something, I may have some evil intent,

qr3 6149

regulating cottonseed oil futures trading did not detect any manipulation or squeeze in 1963.

In fact, you have heard that CEA investigated trading during the last half of 1963 after the fact and concluded that there was no artificial price or manipulation or squeeze.

Now, Professor Gray argues now in 1975 some of the CEA's reasoning, but I would suggest to you that the point is that if the CEA concluded after the fact that there was no manipulation or squeeze, how can you expect someone like Walter Klein to detect this non-existent squeeze or manipulation before the fact in 1963?

There's been testimony about ex-pit transactions involving registered warehouse receipts. Mr. O'Donnell, I believe, covered this area, but I want to make a few points here.

Professor Gray talked about these few transactions as round trips. Other people talked about them as purchases and sales. I believe that the documents which are in evidence will support the latter characterization, that they were purchases and sales.

But, in any case, I think it's pretty clear that there was a financing aspect to these ex-pit

gr4 6150

registered warehouse receipt transactions, and it's also clear that the CEA and the NEw York Produce Exchange and many others were aware of the fact that these ex-pits were being used for financing purposes and nobody saw anything improper with that.

In fact, Mr. DeAngelis and Mr. Gittleman both said that they thought that these ex-pits were proper under the produce exchange rules.

The only one who doesn't agree with that is Professor Gray, and I believe I am accurate when I say that none of plaintiff's other experts endorsed Professor Gray's theory that because these transactions had a financing aspect, they were not proper under the rules.

In any event, it's the view of the CEA that these ex-pit transactions had no effect on prices.

Professor Gray again disagrees with this and theorizes that there was some pattern of holding the registered warehouse receipts off the market.

I think Professor Arthur has debunked that theory but, in any event, I submit that there was no such pattern at all.

As Professor Gray conceded in cross-examination, a large number, a very large number of these registered

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6157

had no information at all about Allied's holdings until the 19th, which is the day that Allied filed.

Yet, in any case, I don't see what difference it makes whether or not Mr. Kenner called Mr. DeAngelis or what time it was, or whether it was an outside call or an inside call.

Similarly with all of the other details of the Bunge-Allied business relationship that plaintiff has gone into, I don't see what different it makes to the issues that you have.

Let me just sort of sum up by summing up very briefly.

Mr. Harris said in his opening, and I think I agreed with himk that you should try to put yourself in Walter Klein's shoes during 1963 and I think you should ask yourself two questions: Should Walter Klein have detected that there was a squeeze or a manipulation going on when the CEA didn't conclude even after the fact that there wasn't one going on?

And should Walter Klein have acted more quickly from the 14th and after, when even Professor Farris says he doesn't know what he would have done if he had been a hypothetical board member at that time.

It will be your job now to return a

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heard that day, and in the light of Haupt's statements that it could no longer carry the position it was holding for Allied.

I think I have caught all of the straws that plaintiff has thrown in the wind with respect to Mr. Vogel; though I must confess to you that it's still not clear to me as to whether the basis on which they seek to hold him personally liable is that he was some kind of secret expert inthe vegetable oil business who in the middle of the night snuck into Totah's office to look at the records of the division, or whether they are trying to hold him liable onthe ground that he wasn't expert enough.

You don't have to be an expert to sit on a board of directors and if that is their theory, then I would suggest to you it flies in the face of the testimony of their expert, Mr. Dahl.

Mr. Dahl was the only expert plaintiff called on his direct case who actually had sat on a board of managers. He sat on a Minneapolis board.

elrf 5

advocacy was not willing to make the last demonstration. In fact he did not price analyis and I think you can infer why he did not price analysis, and he said that he couldn't say what a non-artificial price would be. And as for the subject of DeAngelis' intent, whatever it was, he was keeping it to himself, and even on this witness stand he forgot the role he was supposed to play for the plaintiff.

He would say on this witness stand, my intent wasn't to manipulate, it was to make export sales.

Now, I won't say anything more on the subject of ex-pits; it has been covered by other counsel.

Again, Dr. Gray's view that ex-pits can't be used for financing is contrary to the views that were held by Mr. McMinn of the CEA at the time, was not supported by a single one of their other experts. In fact, Dahl said that the rule of the Produce Exchange on ex-pits was extraordinarily broad and was contradicted by Professor Arthur of Harvard.

In fact, I think you will find it an interesting fact that of the three experts that they called on their direct case, Gray, Dahl and Leuthold, only one, Gray, was prepared to say that there was a manipulation. And his conclusion was contradicted

elrf 6

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by that CEA report with which Professor Arthur of Harvard concurred.

I submit, ladies and gentlemen of the jury, that after all of these weeks of trial plaintiff's own experts can't even make up their mind as to what really happened. And in fact, Mr. Farris, who I would liken upon as a bad after thought in their case, piling assumption upon assumption upon assumption, said that in effect there are as many opinions as there are experts, and we know that there are experts ready to come out of the woods.

Having said all of this about the subject of manipulation, I must say to you that I think this is virtually an irrelevancy, because the question here is not what was in the back of DeAngelis mind; the real question here is whether if he had manipulative intent and if he did do something which Gray said he couldn't demonstrate, which was to peg prices at an artificial level, the question really is whether the New York Produce Exchange and its directors should have perceived this, should have been able to pierce through this camouflage of forged export orders and assurances by DeAngelis and by Haupt that DeAngelis was hedged; and without that -- if he was hedged there

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That on November 14, with disaster on the threshold, Berg finally did what he could have and should have done two months' earlier -- he secured from the CEA the exact position of each trader. But instead of pursuing this knowledge with vigorous activity to ward off disaster, the document was secreted. Its contents appears not to have been discussed at the hastily-called executive committee meeting on November 14, instead a control committee was appointed and letters were sent out to each clearing member asking them to advise the committee of its position. It was too late for such a leisurely approach to a crisis. Indeed, evidence of this can hardly be disputed because the market was closed before all the answers to this inquiry had been received.

Further plaintiff contends that the defendants cannot rely on CEA inaction during the period in question, or its report that no manipulation had occurred on the market to escape liability themselves; that they have the initial obligation under the statute of taking appropriate steps of self-regulation to prevent market manipulation and the disaster which took place in 1963; and that without regard to what the CEA did or should have done, defendants had an

elr2

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obligation independent of the CEA, and it is that obligation which is the basis of this lawsuit.

Finally, plaintiff wants to make it clear that it is not suing for what Haupt lost in advancing credit to Allied. It is suing here for variation margin which Haupt was required to pay between November 14 and November 19. If defendants had taken action in the summer where the warning signs indicated action was necessary, Allied's machinations would have been revealed long before Haupt's involvement; and if they had taken action promptly on November 14 when the extent of Allied's exposure was before them in black and white, while Haupt could not have been saved from injury pursuant to its involvement with Allied, it would have been spared paying out roughly 12 million dollars in variation and stepped-up original margin. The evidence, plaintiff urges, clearly sustains its claim of liability against the exchange and each of the individual defendants.

Defendants contend first that appropriate action was taken within the scope of the authority of the exchange, that they cannot be held to a standard of insuring at their peril that no manipulation or market distorting factors operate; they can only be held liable for failing to do what reasonable men

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(6309)

Now we come to the dissection of the issues which you will have to deal with.

Plaintiff's claims against defendants cover two separate periods of time during 1963 -- from roughly the spring or summer to November 14th, and from November 14th to November 19th. You may find a defendant liable to plaintiff either with regard to his or its conduct prior to November 14th, or with regard to his or its conduct from November 14th to November 19th, or as to both periods.

Unless I inform you otherwise, you should apply the instructions I give you to each of the defendants. Remember, however, that each defendant must be judged separately. You must consider the evidence individually as it applies to each defendant, and you must make a separate finding as to whether each is or is not liable.

Before you may find any defendant liable to the plaintiff for his or its action or inaction during that period, and I am dealing with the pre-November 14, 1963 period, you must be convinced that as to that particular defendant, plaintiff has proved each of the following elements by a fair preponderance of the evidence.

First, that Allied Crude was engaged in a "manipulation," or otherwise distorted the orderly

gwrf 2 6310

functioning of the market in cottonseed oil futures contracts.

Second, that the defendant, that is the defendant you are considering, knew or had reason to believe or suspect that market manipulation or efforts to distort the orderly functioning of the market was occurring.

Third, that the defendant, whose liability you are considering thereafter failed to take appropriate action in light of the circumstances, and finally, that that defendant's failure to act resulted in injury to the plaintiff.

Let me say a few words about each of these elements. As to the first element, plaintiff must prove that Allied was engaged in a market manipulation, or was otherwise distorting the market in cottonseed oil futures.

A commodities exchange is a market in which buyers and sellers enter into contracts for the purchase and sale of commodities at some future date based on their evaluation of the market and its risks. The proper functioning of the exchange is dependent upon market prices being determined solely by the independent judgment and action of buyers and sellers. Consequently, the Commodity Exchange Act, and the rules and regulations

gwrf 5 6313

New York Produce Exchange was a self-regulating market, the Exchange, its Board of Managers and members of the Exchange had the initial responsibility for maintaining orderly market conditions -- that is a market where the law of supply and demand would be freely operative. The Exchange and members of its Board of Managers had the duty to prevent violations of the Commodity Exchange Act and the rules and regulations of the New York Produce Exchange of which they were, or should have been aware, and to exercise reasonable diligence in observing and informing themselves of market conditions that would affect the carrying out of their regulatory responsibilities. You must determine whether the evidence discloses that prior to November 14, the Exchange and/or the individual defendants, that is whether the defendant whose liability you are considering, had sufficient facts at hand-- warning signals -- as they have been designated in this trial -- to know or have reason to believe or suspect that a market manipulation or an effort to distort market conditions was occurring.

Moreover, your determination is not limited by what a defendant actually knew, but what the facts indicate he should have known in the light of his responsibilities and the circumstances. Furthermore,

gr1 6318

Before you may find any of the defendants liable to the plaintiff for his or its conduct during this period, you must be convinced that as to that particular defendant, plaintiff has proved each of the following elements by a fair preponderance of the evidence.

First, that the defendant failed reasonably to carry out his or its duties and abused his discretion in regulating the market, and

Second, that such failure to act reasonably and such abuse of discretion was a proximate cause of plaintiff's injury.

Let me comment briefly on each of these elements. You must first find that the defendant failed to reasonably carry out his or its regulatory responsibilities.

I charge you that under the applicable law, the exercise by an exchange of its regulatory functions and responsibilities must be carried out in an atmosphere of broad discretion, keeping in mind the exigencies of the particular situation.

Similarly, a director has broad discretion in making business judgments. Thus, unles s you find that a defendant's conduct during this period deviated from

gr2 6319

that which reasonable men in similar positions and circumstances might have taken, you must find for that defendant. The standard here is not what the defendant might have done or could have or even should have done, but whether the acts of the defendant can be said to have been so patently unreasonable as to constitute an abuse of discretion.

I instruct you that Walter Klein was away from New York on a business trip from November 17, 1963 until November 20, 1963. If you find that Klein did not purposefully absent himself from New York between November 17 and November 20, 1963, in derogation of his duties as a director, I instruct you that he cannot be held liable for any of the events that occurred during that time.

I instruct you that Harold Vogel was not in New York on November 14 and did not return to his office until November 18, 1963. Since he did not return to his office until November 18, 1963, I instruct you that he cannot be held liable for any of the events, including the actions of the board at its meeting of November 14, that occurred between November 14 and November 18, 1963.

As to each defendant, only if you find that

gr4 6321

injuries, then you may find for the plaintiff. Again, if you reach this conclusion, at this stage, such determination must be tentative only.

Let me again emphasize that you may find the defendants liable to plaintiff either with regard to their conduct prior to November 14, or with regard to their conduct from November 14th to 19th, or as to both of these periods.

Now, it is the contention of the defendants in this case that Haupt's own conduct during the period in question was the cause of any injury it claims it has suffered.

I charge you that an exchange is not responsible for supervising the internal affairs of member brokers. It is not the exchange's responsibility to guarantee that employees of member firms are acting honestly or wisely.

Indeed, while the exchange and its directors owe a duty of care to member brokers of the exchange, such member brokers owe a duty to the exchange as well, a duty to act with reasonable care in maintaining the integrity of the self-regulated market.

Thus, if you find that any acts or omissions

gr5 6322

on the part of Ira Haupt and Company, or of Haupt's officers or employees, acting within the scope of their employment, were a proximate cause of Haupt's injuries, then you must find in favor of the defendants. Now, recall that I have already explained to you the meaning of proximate cause.

Let me emphasize that in order for defendants to prevail on the basis of Haupt's own misconduct, defendants bear the burden of convincing you, by a fair preponderance of the evidence, that Haupt's own acts or omissions were a proximate cause of its injury.

Therefore, if you have found that plaintiff's injury was proximately caused by a defendant's acts or failure to act during the period prior to November 14, or during the period November 14th to 19th, or both, and you find that plaintiff's own conduct during any part of the time span involved was also a proximate cause of plaintiff's injury, you must find for the defendant. Plaintiff can succeed only if the defendant's action or inaction was a proximate cause of plaintiff's injury, and plaintiff's own action or inaction was not.

Your sworn duty here is to decide the issues in this case fairly and impartially upon the evidence

elrf 5b am 1 6334

THE COURT: There is no point in saving time. Make your record.

MR. HARRIS: Okay. With regard to the charge during the period November 14th to November 19th, the beginning, you indicate that it is plaintiff's contention that the Board and the Exchange negligently failed to close the market on the 14th or take emergency action on that date. But instead waited until November 19th. That is our contention but it is also our contention that they should have taken emergency action earlier and also subsequent to the 14th, they didn't do it on the 14th, they should have done it on the 15th, if they didn't do it on the 15th, they should have done it on the 15th.

MR. O'DONNELL: That is implicit.

THE COURT: I think that is clear. At least I am going to assume it is clear.

MR. HARRIS: Your Honor, again a couple of pages later when you charge as to abuse of discretion, we take exception to that standard as applied during that period.

THE COURT: I want to say on the record that I did use the two standards and I think that your negligence standard applies only to the first

elrf 2 6335

action, that is before the 14th. I think it is a different standard from November 14th on.

MR. HARRIS: I understand. I am just making the record. We take exception to that. I also think that the use of the term patently unreasonable -- I don't know what page it is, again -- just before about Walter Klein.

MR. O'DONNELL: About five from the end.

MR. HARRIS: We would take exception to the phrase patently unreasonable. Your Honor, we would except to the charge as regarding Walter Klein and Harold Vogel being away on the ground that we think they were negligent being away at that time.

THE COURT: I thought that during the course of this trial you had conceded that they weren't there, that they couldn't be responsible for any acts that occurred from November 14th on.

MR. HARRIS: Mr. Klein was there on the 14th, he knew what the situation was.

MR. LIMAN: And Mr. Vogel didn't remember on the 18th. I thought you were going to except to the Court not putting that in.

MR. HARRIS: We come over to the charge involving Haupt. We take exception to the charge that

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members of the Exchange have a duty to act with reasonable care in maintaining the integrity of the self-regulated market. We think there is an overriding duty on the part of the Exchange and we think there should be a charge to that effect.

We also think there should be a charge to the effect that Bunge and Continental and Merrill Lynch were members of the Produce Exchange and if Haupt had a duty to maintain the integrity of the contracts, they had a duty as well.

MR. LIMAN: There is a difference. We are not suing.

MR. HARRIS: I understand. We object on the next page to the charge that they could find that Haupt's conduct was also a proximate cause of the plaintiff's injury. We would contend that while there could be several proximate causes in the sense that several defendants could do similar acts that would all be the proximate cause of the plaintiff's injury, there could not be the plaintiff's acts and the defendants' acts both being proximate causes of the plaintiff's injuries, and we except to that.

I also request that there are a charge in the plaintiff's contentions that Mr. Stevens was not

elrf 4

6337

acting in the scope of his employment and on the contrary --

THE COURT: There has been no evidence of that. Anything else?

MR. HARRIS: Yes. We think there it would be appropriate for a charge relating to Rule 6-B and -- reporting requirements under Rule 6-B of the cottonseed oil rules.

MR. O'DONNELL: That is an exhibit, your Honor.

THE COURT: I indicated that they are supposed to act within the rules and regulations. I charged them long enough. What else?

MR. HARRIS: For the record, your Honor, I would like to incorporate those charges that we requested in our previous request that were submitted to the Court that you indicated the other day, and we went over them would be rejected. I don't think it is necessary for me to repeat them. I don't think it is worth wasting time repeating everything over again in the record.

MR. SMITH: Let me initially try to speak with everyone subject to their disassociating themselves to whatever I say or adding something at the end.

elrf 10

6343

MR. HARRIS: We would object to the special verdict. First, we incorporate here the reference made about the charge --

MR. LIMAN: Are you objecting to a special verdict as such.

MR. HARRIS: Yes.

MR. LIMAN: Your Honor, I would be very happy to waive a special verdict and take a general one, if plaintiff doesn't want it.

MR. MINNEROP: I agree with Mr. Liman.

MR. LIMAN: A general verdict is sufficient as far as I am concerned.

MR. FRYER: I will also waive one, your Honor.

THE COURT: This helps guide the jury in terms of what they are going to do.

MR. LIMAN: If plaintiff doesn't want one, and this is an argument that he is going to make later, I would urge your Honor to let the jury, the jury will, it seems to me, are out there studying the charge, they know what the elements are, and why should we add another element here. I would go right along with the plaintiff on this if he doesn't want it.

MR. HARRIS: We don't see that it is

elrf 11 [6344]

necessary, your Honor.

THE COURT: All right. Let's proceed.

MR. MINNEROP: Your Honor, are you going to require a special verdict?

THE COURT: They objected to it and everybody-- it has now been waived. You have waived -- I will let them have a general verdict, although I think it is going to cause more problems.

(End of robing room.)

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(6:00 o'clock p.m. a note received from the jury.)

(In open court, jury absent.)

(Note marked Court's Exhibit 2 for identification.)

THE COURT: I see, gentlemen, the problems begin at 6:00 o'clock.

MR. O'DONNELL: Have you focused on the problem, your Honor?

THE COURT: Which of these exhibits are not in evidence that they have asked for?

MR. O'DONNELL: Quite a few, your Honor. I think, of course, what they have done -- at least I deduce what they may have done is jot down in their notes exhibits as those exhibits were being talked about, and some of those are not in evidence.

THE COURT: Is Exhibit 1 in evidence?

MR. LIMAN: Defendant's Exhibit 1-A.

MR. O'DONNELL: Defendant's Exhibit 1-A is in evidence. That is the authenticated copy of 1. 1 was not admitted.

THE COURT: What is 16-A to F?

MR. LIMAN: Your Honor, I think part of the problem is, it is not quite identifiable. They

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6378-6379

HARVEY R. MILLER

vs. 66 Civ. 1016

NEW YORK PRODUCE EXCHANGE, et al.

October 31, 1975
10:00 a.m.

Trial resumed.

- - -

(In open court; jury absent)

MR. LIMAN: Your Honor, whenever I make a suggestion out of fear of appeal, I am wrong. I think that in the light of the question that the jury asked you yesterday about what it had to find, that they were asking you for the equivalent of a special verdict.

Mr. Harris objected to it and out of fear that we are going to have another issue on appeal, I said that we weren't pressing it and that your Honor should not create this kind of issue. But the fact of the matter is that that jury's question to your

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Honor was tantamount to that kind of a suggestion.

THE COURT: What is my posture now by giving them that?

MR. LIMAN: According to Moore and --

THE COURT: No, at this point?

MR. LIMAN: You have the power.

THE COURT: Obviously.

MR. LIMAN: The defendants --

THE COURT: Since you and Mr. Harris backed me off of it initially, what is the posture now?

MR. HARRIS: We continue to object, your Honor.

THE COURT: I understand you continue to object.

MR. HARRIS: The defendants waived it, I guess they are now reversing themselves.

THE COURT: Mr. Harris, sit down. My question is now addressed to Mr. Liman. He is now backing off. I am asking him now what is the posture in this regard if I now decided to do what I thought I should have done in the first place.

MR. LIMAN: I think you could say that if you feel that it would be of assistance to them to

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give them this. We don't have any objection if you follow the practice of giving them the entire charge, which some judges do; many don't.

The case is so complex that anything that would enable them to focus, so that they do not have to rely on memory as to what all these elements are, it seems to me that we ought to be in favor of it.

THE COURT: The business about giving them the charge, what authority do you have for that?

MR. LIMAN: I know that some judges do and have.

THE COURT: Have they been appealed?

MR. LIMAN: I know that at the very least you can do there, and I don't know whether there is an objection from the other side to giving them the entire charge.

THE COURT: I would not want to give them the entire charge, which includes my arguments for the plaintiff and the defendant. I think my argument was a little stronger than either one of you made. I would not consider giving them the charge with those matters included.

Actually the only thing they'd need is the other. What do you feel about that, Mr. Harris? I know

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that you object to the special verdict. I have decided I was going to do that. I didn't do it principally because of the fact that the defendants seemed to waive their right to have it on the view that that would produce an issue if the matter is appealed. The matter is going to be appealed anyway, regardless of who wins. What is your posture about the charge?

MR. HARRIS: We don't have a great objection to givine them that portion of the charge I gather you indicated which would be the part starting after the contentions of the two parties, although it seems to me you read that back to them when they came in with the question yesterday, and they seemed to understand it.

I don't think the jury has been out long enough for anybody to have a feel of whether or not they are having any trouble understanding the issues or evaluating the case.

THE COURT: They obviously had some problem in understanding what the case was about because they didn't know how they could get the verdict and they apparently felt that they had to -- they made some findings; the earlier period or the later period, as to whether that had anything to do with the final verdict.

elr

MR. HARRIS: I think the problem with the written charge, your Honor, of course we have objected to some portions of it as prejudicial to the plaintiff and I auppose --

MR. LIMAN: You don't have to suppose that we have objected, of course we have objected to some portions.

MR. HARRIS: That isn't what I was going to say. Giving them the charge in writing would compound what we feel is prejudicial. You used the first tentative only, as to findings for the plaintiff, and you meant that they then had to reach the Haupt question. I don't know if they see it in writing it will be clear.

THE COURT: I think the charge is clear. But what I think I will do is, I think the value of the special verdict takes them through the proceeds of the charge, and I think that points as a road map for them as to how they are to proceed and that is how I perceive the special verdict.

That is the reason I took the trouble of putting it together.

MR. HARRIS: We feel the special verdict is prejudicial, because the way the road map is set out

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invites a verdict for the defendant.

THE COURT: Well, I think the special verdict is satisfactory.

MR. LIMAN: Your Honor, on the jury's request with respect to the exhibits, I have a suggested statement with respect to the charts; some ofthe underlying documents are inevidence and we submit those should go with the charts. Some aren't, and they can't, and I have given a copy of this to Mr. Harris. He has some different views on it, but I will let him speak for himself.

THE COURT: Are these Plaintiff's 9A, these other references, Mr. Liman?

MR. LIMAN: 9A through E are the reference back which are in evidence. They areplaintiff's.

THE COURT: And 10A is plaintiff's?

MR. LIMAN: 10A, those are also plaintiff's, butthose can't be given to them. I'm not proposing obviously something that is not in evidence. I am just indicating theyare the source but not in evidence.

MR. HARRIS: I was planning to address myself to 122 to 126 anyway. I object to this proposed statement. In fact, the plaintiff objects to giving the jury any underlying documents at this point. They

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you before, your considerations are now narrowed and you were considering other things. I have prepared and I am now going to give to you a special verdict which will set out for you the process that you go through in arriving at your decision. The last page of it is a single sheet that you have for your final verdict.

I had not given ti to you inadvertently, shall I say, and I will now give it to you. I think in view of your questions, it will be of some use.

I don't think I have anything else. With the exhibits that will be given to you now, you can now go back and maybe in an hour or so I will call you back in to have read to you the exhibits from the transcript and at that point you may be able to tell us what these mysterious references are that you want.

MR. O'DONNELL: Your Honor, I have a matter, but it can await the jury's retiring or I can approach the side bar.

THE COURT: Let's wait. Have I covered everything, Mr. Harris?

MR. HARRIS: Yes, sir.

THE COURT: All right.

THE FORELADY: Your Honor, 122 we can't have, is that right?

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THE COURT: It is on the record, Mr. Harris.

Anything else?

MR. HARRIS: No, your Honor.

THE COURT: I have a verdict. As is my practice, I prefer to be surprised along with everybody else. So I don't know what it is. I propose, however, that if there is a-- the verdict for liability is in the plaintiff's favor, to proceed with that phase of the case on Wednesday; and I am going to announce it to the jury. Not Monday. I have already set a matter down and I would just as soon do that. Tuesday will be a holiday, so I therefore am proposing to proceed on Wednesday. I might as well tell you that. I'm not going to tell them that in the event we have a plaintiff's verdict.

(Jury entered courtroom.)

THE CLERK: Madam Forelady, has the jury agreed to a verdict?

THE FORELADY: We have, your Honor.

THE CLERK: Would you read your verdict, please?

THE FORELADY: The jury has found for the defendants the New York Produce Exchange, Donald V. MacDonald, Harry B. Anderson, Walter C. Klein,

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Harold C. Vogel and Sidney Fashena.

THE COURT: Any further?

MR. HARRIS: May the jury be polled, your Honor?

THE COURT: Yes.

THE CLERK: You say you find a verdict for the defendants New York Produce Exchange, Donald V. MacDonald, Defendant Harry B. Anderson, Defendant Walter C. Klein, Defendant Harold C. Vogel and Defendant Sidney Fashena?

(Each juror, upon questioning was asked "Is that your verdict" responded in the affirmative.)

THE CLERK: So so you all?

THE COURT: Ladies and gentlemen, I now will excuse you from this long task, and you can return to your various personal responsibilities. But I again want to thank you for the manner in which you have conducted yourselves during these six or seven weeks, and I have some cases that are lined up and I wish I could borrow you as jurors for that. Thank you very much.

(The jury was discharged and left the courtroom.)

THE CLERK: The verdict will be marked as Court's Exhibit 4.

Special Verdict

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt,

Plaintiff,

- against -

NEW YORK PRODUCE EXCHANGE, et al.,

Defendants.

66 Civ. 1016

SPECIAL VERDICT

- x

Be sure to consider BOTH Questions 1 through 4, AND 5 through 7.

AS TO THE PERIOD PRIOR TO NOVEMBER 14, 1963

1. Has the plaintiff proved by a fair preponderance of the evidence that Allied Crude was engaged in market manipulation, or was otherwise distorting the orderly functioning of the market in cottonseed oil futures contracts?

_____ Yes _____ No

IF THE ANSWER TO THIS QUESTION IS "NO" YOU MUST FIND FOR THE DEFENDANTS AS TO THE PERIOD PRIOR TO NOVEMBER 14, 1963.

2. If the answer to Question #1 was "YES" has the plaintiff proved by a fair preponderance of the evidence that the defendant or defendants knew or had reason to believe or suspect that a market manipulation or an attempt to distort the orderly functioning of the market was occurring?

The New York Produce Exchange	Yes	No
Donald V. MacDonald	Yes	No
Harry B. Anderson	Yes	No
Walter C. Klein	Yes	No
Harold C. Vogel	Yes	No
Sidney Fashena	Yes	No

IF YOU FIND THAT THE ANSWER TO THIS QUESTION IS "NO" AS TO ANY PARTICULAR DEFENDANT OR DEFENDANTS, YOU MUST FIND FOR THAT DEFENDANT OR DEFENDANTS AS TO THE PERIOD PRIOR TO NOVEMBER 14, 1963.

3. If your answer to Question #2 was "YES" as to a particular defendant or defendants, has the plaintiff proved by a fair preponderance of the evidence that that defendant or defendants failed to take appropriate action in light of the circumstances?

The New York Produce Exchange ____ Yes ____ No

Donald V. MacDonald ____ Yes ____ No

Harry B. Anderson ____ Yes ____ No

Walter C. Klein ____ Yes ____ No

Harold C. Vogel ____ Yes ____ No

Sidney Fashena ____ Yes ____ No

IF YOU FIND THAT THE ANSWER TO THIS QUESTION IS "NO" AS TO ANY PARTICULAR DEFENDANT OR DEFENDANTS, YOU MUST FIND FOR THAT DEFENDANT OR DEFENDANTS AS TO THE PERIOD PRIOR TO NOVEMBER 14, 1963.

4. If your answer to Question #3 was "YES" as to a particular defendant or defendants, has the plaintiff proved by a fair preponderance of the evidence that the action or inaction of that defendant or defendants was a proximate cause of Haupt's injuries?

The New York Produce Exchange ____ Yes ____ No

Donald V. MacDonald ____ Yes ____ No

Harry B. Anderson ____ Yes ____ No

Walter C. Klein ____ Yes ____ No

Harold C. Vogel ____ Yes ____ No

Sidney Fashena ____ Yes ____ No

IF YOU FIND THAT THE ANSWER TO THIS QUESTION IS "NO" AS TO ANY PARTICULAR DEFENDANT OR DEFENDANTS, YOU MUST FIND FOR THAT DEFENDANT OR DEFENDANTS AS TO THE PERIOD PRIOR TO NOVEMBER 14, 1963.

AS TO THE PERIOD FROM NOVEMBER 14 to NOVEMBER 19, 1963

5. Has the plaintiff proved by a fair preponderance of the evidence that the defendant or defendants failed to reasonably carry out his or its duties and abused his or its discretion in regulating the market?

The New York Produce Exchange ____ Yes ____ No

Donald V. MacDonald ____ Yes ____ No

Harry B. Anderson ____ Yes ____ No

Walter C. Klein ____ Yes ____ No

Harold C. Vogel ____ Yes ____ No

Sidney Fashena ____ Yes ____ No

IF YOUR ANSWER TO THIS QUESTION IS "NO" AS TO ANY PARTICULAR DEFENDANT OR DEFENDANTS, YOU MUST FIND FOR THAT DEFENDANT OR DEFENDANTS AS TO THE PERIOD NOVEMBER 14 to NOVEMBER 19, 1963.

6. If your answer to Question #5 was "YES" as to a particular defendant or defendants, has the plaintiff proved by a fair preponderance of the evidence that such a failure to act reasonably and such an abuse of discretion on the part of that defendant or defendants was a proximate cause of Haupt's injuries?

The New York Produce Exchange	Yes	No
Donald V. MacDonald	Yes	No
Harry B. Anderson	Yes	No
Walter C. Klein	Yes	No
Harold C. Vogel	Yes	No
Sidney Fashena	Yes	No

IF YOU FIND THAT THE ANSWER TO THIS QUESTION IS "NO" AS TO ANY PARTICULAR DEFENDANT OR DEFENDANTS, YOU MUST FIND FOR THAT DEFENDANT OR DEFENDANTS AS TO THE PERIOD NOVEMBER 14 TO NOVEMBER 19, 1963.

7. If your answers to Questions 1 through 4 were "YES" and/or your answers to Questions 5 and 6 were "YES", have the defendants proved by a fair preponderance of the evidence that the action or inaction of Ira Haupt & Co. either prior to or subsequent to November 19, 1963, was also a proximate cause of its own injury?

_____ Yes _____ No

IF YOUR ANSWER TO THIS QUESTION IS "YES" YOU MUST FIND FOR THE DEFENDANTS. IF YOUR ANSWER TO THIS QUESTION IS "NO", AND YOU HAVE ANSWERED "YES" TO QUESTION 1 THROUGH 4 AND/OR TO QUESTIONS 5 AND 6 AS TO A PARTICULAR DEFENDANT OR DEFENDANTS, YOU MUST FIND FOR THE PLAINTIFF AS AGAINST THAT PARTICULAR DEFENDANT OR DEFENDANTS.

8.

VERDICT

FOR THE PLAINTIFFS

AGAINST DEFENDANTS

The New York Produce Exchange _____

Donald V. MacDonald _____

Harry B. Anderson _____

Walter C. Klein _____

Harold C. Vogel _____

Sidney Fashena _____

FOR THE DEFENDANTS

The New York Produce Exchange _____

Donald V. MacDonald _____

Harry B. Anderson _____

Walter C. Klein _____

Harold C. Vogel _____

Sidney Fashena _____

Final Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & COMPANY, a Limited Partnership, Bankrupt,

Plaintiff,

-against-

NEW YORK PRODUCE EXCHANGE, et al.,

Defendants.

----------x

FINAL JUDGMENT

66 Civ. 1016 (R.L.C.)

Whereas, a Judgment was entered in the above-entitled action on December 4, 1974 dismissing the amended complaint with respect to defendants NEW YORK PRODUCE EXCHANGE, DONALD V. MacDONALD, HARRY B. ANDERSON, MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, WALTER C. KLEIN, BUNGE CORPORATION, HAROLD H. VOGEL, CONTINENTAL GRAIN COMPANY, SIDNEY FASHENA, and I. USISKIN & COMPANY, and dismissing the counterclaim of defendant NEW YORK PRODUCE EXCHANGE against plaintiff; and

Whereas, an Order was filed on December 3, 1975 discontinuing, pursuant to Rule 54 of the Federal Rules of Civil Procedure, the above entitled action with respect to defendants FAHNESTOCK & CO., CARL R. BERG, LUCY W. MILLER, MAX J. ROSENBERG and IRA E. SCHEIN, Executors of the Last Will of SOLOMON J. WEINSTEIN, deceased, and DAVID L. BOYER; and

Whereas, an Order was filed on January , 1976 discontinuing with prejudice the above entitled action with respect to defendant, NEW YORK PRODUCE EXCHANGE CLEARING ASSOCIATION; and

Whereas, Rule 54(b) of the Federal Rules of Civil Procedure provides that, absent a specific determination, an order which adjudicates fewer than all the claims, rights or liabilities of fewer than all the parties is subject to revision;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the aforementioned Orders of December 3, 1975 and January , 1976 and the Judgment entered December 4, 1975 shall together constitute the final Judgment in this action, and the claims, rights and liabilities of the parties to this action are hereby finally adjudicated pursuant to the respective terms thereof.

Dated: New York, New York
January , 1976

_____
U.S.D.J.

Judgment entered the
day of January, 1976.

_____
Clerk of the Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

HARVEY R. MILLER, as Trustee in Bankruptcy of Ira Haupt & Co., a Limited Partnership, Bankrupt,

Plaintiff,

-against-

NEW YORK PRODUCE EXCHANGE, NEW YORK PRODUCE EXCHANGE CLEARING ASSOCIATION, ET AL.,

Defendants.

STIPULATION

66 Civ. 1016 [RLC]

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STIPULATION OF DISMISSAL WITH PREJUDICE AND ORDER

IT IS HEREBY STIPULATED by and between the plaintiff and the New York Produce Exchange Clearing Association, one of the defendants herein, through their respective counsel, that the above-entitled action, be, and it hereby is, dismissed with prejudice only as against the defendant New York Produce Exchange Clearing Association.

IT IS FURTHER STIPULATED by and between the plaintiff herein and the defendant New York Produce Exchange Clearing Association, through their respective counsel, that each party shall bear its own costs.

Dated: New York, New York
December 31, 1975

BAER & MARKS
Attorneys for Defendant New York Produce Exchange Clearing Association

By _____
A Member of the Firm

SO ORDERED:
Dated: New York, N.Y.
January , 1976

_____
United States District Judge

WEIL, GOTSHAL & MANGES
Attorneys for Plaintiff

By _____
A Member of the Firm

Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt,	:	NOTICE OF APPEAL
Plaintiff,	:	66 Civ. 1016 (RLC)
-against-	:	
NEW YORK PRODUCE EXCHANGE, et al.,	:	
Defendants.	:	

S I R S :

PLEASE TAKE NOTICE that the plaintiff, HARVEY R. MILLER, as Trustee in Bankruptcy for IRA HAUPT & CO., a Limited Partnership, Bankrupt, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered in this action on December 4, 1975 as finalized by the Final Judgment entered in this action on January 30, 1976.

Dated: New York, New York
February 2, 1976

Yours, etc.

WEIL, GOTSHAL & MANGES
Attorneys for Plaintiff
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

By _____
A Member of the Firm

TO: CLERK
United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

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tal Grain Company and Harold
H. Vogel
345 Park Avenue
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Documents Filed Subsequent to the Notice of Appeal Pursuant to Stipulation

Exhibit 52 Marked at a Deposition of John Ferretti Appearing on Behalf of Continental Grain Company

FTS 3/18/70-37

K293

NORTH AMERICAN CONTINENTAL CO.
DIVISION OF
ARROW CONTINENTAL CORPORATION
2 BROADWAY
NEW YORK 4, N. Y.

September 19, 1962.

Allied Crude Vegetable Oil Refining Corp.
Foot of East 22nd. Street
Bayonne, New Jersey.

Attention: Mr. Ben BOTELLO

Gentlemen:

Our refer to our yesterday's [illegible] conversation and your agreement to post additional collateral with us [illegible] form of a Warehouse Receipt for Crude Degummed Soybean Oil as margin against your outstanding [illegible] and all our outstanding finance agreements with you.

Further, this is to acknowledge receipt of the following Warehouse receipt:

Harbor Tank Storage Co., Inc. Warehouse Receipt No. [illegible] dated September 19, 1962, 2,500,000 lbs. Crude Degummed Soybean Oil

You are to keep the 2,500,000 lbs. of oil fully insured whilst in store Harbor Tank Storage Co., Inc. on all risk basis and you are to arrange to provide us with the necessary insurance under showing us as loss Payee

It is understood and agreed that we may utilize/dispose of the above mentioned quantity of Crude Degummed Soybean Oil in any way and in any manner with the understanding that the proceeds will be credited to your account with us and applied against any and all outstanding indebtedness you may have with us.

It is further understood and agreed by you to replace the above mentioned warehouse receipt of Harbor Tank Storage Co., Inc. by one of American Express Field Warehousing Corp. This swap is to be effected latest by September 28, 1962.

Please signify your agreement by signing and returning copy of this letter.

Very truly yours,
NORTH AMERICAN CONTINENTAL CO.
Division of
ARROW CONTINENTAL CORPORATION

John Ferretti
Assistant Treasurer

AGREED:
ALLIED CRUDE VEGETABLE
OIL REFINING CORP.

BY [signature]

DATE _____

JF.CR.

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S7 [illegible] 0

Complaint

COURT OF THE STATE OF NEW JERSEY

COUNTY

----------x

CHARLES SELIGSON as Trustee in Bankruptcy of Ira Haupt & Co., a Limited Partnership, Bankrupt, :

Plaintiff, :

-against- : COMPLAINT

BUNGE CORPORATION AND WALTER CHARLES KLEIN, :

Defendants. :

----------x

Plaintiff, by his attorneys Weil, Gotshal & Manges and Cole, Berman & Garth, for his complaint herein, alleges, upon information and belief, except as to Paragraphs 2 & 3 hereof, as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. At all times hereinafter mentioned Ira Haupt & Co. (hereinafter referred to as "Haupt") was a limited partnership formed in accordance with the laws of the State of New York and was engaged in a general securities and commodities brokerage and commission business, formerly with an office and principal place of business at No. 111 Broadway, New York, New York.

2. On March 23, 1964, an involuntary petition in bankruptcy was filed against Haupt in the United States District Court for the Southern District of New York. Said proceedings were referred generally to the Hon. Edward J.

Ryan, Referee in Bankruptcy and on June 26, 1964 said Referee in Bankruptcy entered a decree adjudging Haupt a bankrupt. On October 6, 1964, plaintiff was duly appointed Trustee of the Bankrupt Estate of Haupt and thereafter qualified, and plaintiff is presently the duly qualified and acting Trustee in Bankruptcy of Haupt.

3. This action is instituted pursuant to leave of the Hon. Edward J. Ryan by Order dated , 1967.

4. Defendant Bunge Corporation (hereinafter referred to as "Bunge"), a corporation organized and existing under the laws of the State of New York, is engaged in the business, among other things, of buying and selling commodities in various states of the United States and in the State of New Jersey.

5. Defendant Walter Charles Klein (hereinafter referred to as "Klein") is a resident of the State of New Jersey, residing at 323 Hartshorn Drive, Short Hills, New Jersey. At all material times hereinafter mentioned Klein was the President and a Director of Bunge.

6. Commencing in or about 1957 continuing through and including November 1963 various wholly owned subsidiaries of American Express Company (hereinafter referred to as "Amexco") conducted a field warehousing operation at certain storage tanks subleased or purportedly subleased from Allied Crude Vegetable Oil Refining Corporation (hereinafter referred to as "Allied") at a tank farm in Bayonne, New Jersey (that portion subleased or purportedly subleased to Amexco

hereinafter being referred to as the "Amexco Field Warehouse"). From on or about 1944 and continuing through and including May 1963, Amexco's field warehousing business, including the Amexco Field Warehouse, was conducted through American Express Field Warehousing Corporation. From on or about May 31, 1963 to at least the month of November 1963, Amexco's field warehousing business, including the Amexco Field Warehouse, was conducted through American Express Warehousing, Ltd.

7. Commencing in or about June 1960, and continuing through and including November 1963, Harbor Tank Storage Co., Inc., (hereinafter referred to as "Harbor Tank") conducted a field warehousing operation at certain storage tanks subleased or purportedly subleased from Allied at a tank farm in Bayonne, New Jersey (that portion subleased or purportedly subleased to Harbor Tank hereinafter being referred to as the "Harbor Tank Field Warehouse").

8. At the Amexco Field Warehouse, Amexco issued to persons, firms and corporations designated by Allied, including Haupt and persons, firms and corporations loaning monies to Haupt, warehouse receipts for soybean oil, cottonseed oil and other commodities stored or purportedly stored at the Amexco Field Warehouse by Amexco for Allied and the warehouse receipt holders. Similarly, at the Harbor Tank Field Warehouse, Harbor Tank issued to persons, firms and corporations designated by Allied, including Haupt and persons, firms and corporations loaning monies to Haupt, warehouse receipts for soybean oil, cottonseed oil and other commodities stored or

purportedly stored at the Harbor Tank Field Warehouse by Harbor Tank for Allied and the warehouse receipt holders.

9. During the times referred to in paragraph 7 above Allied and Anthony DeAngelis (hereinafter referred to as "DeAngelis"), President and controlling person of Allied, caused Harbor Tank to issue many millions of dollars worth of fraudulent warehouse receipts purportedly representing soybean oil, cottonseed oil and other commodities stored at the Harbor Tank Field Warehouse. The warehouse receipts so issued were fraudulent because, inter alia, commodities for which they were issued were either non-existent and therefore never stored at the issuing field warehouse, or, although stored at the issuing field warehouse at the time of issuance of said warehouse receipts, were subsequently improperly removed from the issuing field warehouse by Allied and DeAngelis.

10. During the times referred to in paragraph 7 above, Allied and DeAngelis from time to time transferred or caused to be transferred through the channels of interstate commerce, the United States mails and otherwise to numerous persons, firms and corporations located in various parts of New Jersey and New York, among other places, fraudulent warehouse receipts issued by Harbor Tank at the Harbor Tank Field Warehouse, which receipts Allied and DeAngelis knew were fraudulent as aforesaid. Said fraudulent warehouse receipts were transferred by Allied and DeAngelis for monies and other consideration in excess of many millions of dollars, all in violation of numerous criminal statutes of the United States, the State of New Jersey, the State of New York and other jurisdictions.

11. Commencing some time prior to September 26, 1962, to and including November 1963, defendant Bunge, among others, was a source of financing for Allied's purchases and sales of commodities and commodity futures contracts. This financing was collateralized by registered and field warehouse receipts issued by Harbor Tank and Amexco covering commodities stored or purportedly stored, among other places, at their respective field warehouses, and by forward sales contracts between Allied and Bunge and others. Said warehouse receipts purportedly covering commodities in the custody of the warehousemen issuing said receipts were used by brokers, banks and others as collateral for credit which persons, firms and corporations extended to Allied, all of which was known by Bunge and Klein.

12. As of August 31, 1962 Allied had outstanding warehouse receipts which it had caused to be issued for commodities stored or purportedly stored at the Harbor Tank and Amexco Field Warehouses valued at approximately $37,850,000. At that time Allied's inventory reflected a shortage of oil equal to approximately $7,000,000 which shortage was later revealed to Bunge and Klein as hereinafter alleged.

13. Commencing some time prior to and continuing to and including September 1962 Allied caused Harbor Tank to issue to Bunge a number of field warehouse receipts as security for monies borrowed or otherwise owed to Bunge by Allied, which warehouse receipts allegedly represented commodities stored at the Harbor Tank Field Warehouse.

14. On or about September 26, 1962 defendant Bunge loaned to Allied approximately $2,400,000 and Allied gave to defendant Bunge as collateral therefor two field warehouse receipts issued by Harbor Tank covering approximately 34,300,000 lbs. of crude soybean oil allegedly stored in two specific tanks (Nos. 5084 and 5087) at the Harbor Tank Field Warehouse. At that time, Bunge held warehouse receipts issued by Harbor Tank on behalf of Allied purportedly covering in excess of 230,000,000 lbs. of commodities.

15. In September 1962 Bunge engaged Superintendence Company (hereinafter referred to as "Superintendence") a licensed inspector, weigher and sampler, to make a general field audit of all the oil evidenced by warehouse receipts issued or purportedly issued by Harbor Tank and Amexco which were held as collateral for financing extended by Bunge to Allied. As part of said overall inventory, Superintendence was requested by defendants Bunge and Klein to inspect the two tanks located at the Harbor Tank Field Warehouse (Nos. 5084 and 5087) which purportedly held approximately 34,300,000 lbs. of crude soybean oil represented by the two warehouse receipts upon which Bunge had, on September 26, 1962, loaned $2,400,000 to Allied. The inspection of the aforementioned tanks was to be the beginning of the aforesaid general field audit which had been ordered by defendants Bunge and Klein.

16. On September 26, 1962 an inspection team composed of Superintendence employees James Lapanna and Daniel Byrne went to the Harbor Tank Field Warehouse to

inspect the aforesaid tanks, but were prevented from doing so by employees of Allied and employees of Harbor Tank under the control of Allied. At that time, and when the Superintendence inspectors persisted in their attempt to inspect said tanks, said inspectors were threatened with a firearm by an employee of Harbor Tank under the control of Allied and one member of said inspection team, James Lapanna, was given a check for $25,000. by DeAngelis in order to induce said inspectors to make a false report and conceal the true facts and results of their attempt to inspect the tanks, all in violation of the New Jersey Penal Code.

17. On or about September 26, 1962 and after accepting the aforesaid check from DeAngelis, the aforesaid members of the Superintendence inspection team reported to their superiors at Superintendence, including Jules Salmanowitz (hereinafter referred to as "Salmanowitz"), President of Superintendence, the entire incident alleged in paragraph 16 above, including the threat with a firearm by a Harbor Tank employee and the attempted $25,000. bribe by DeAngelis.

18. On or about the morning of September 27, 1962 Salmanowitz informed the management of Bunge, including Klein, of the incident set forth in paragraph 16 above, including the threat with a firearm and the attempted $25,000. bribe. Subsequently, on that morning, and after an unsuccessful attempt by telephone to persuade Allied to repay the $2,400,000 collateralized by warehouse receipts of Harbor Tank

covering oil purportedly stored in the aforesaid two tanks, defendant Klein and other executives of defendant Bunge (Hamilton Kenner - Bunge Secretary and Counsel, Richard Forti - Bunge Vice President, Harry Fornari - Bunge Vice President, and Karl Groeneveld - Bunge Comptroller) went to Allied's offices in Bayonne, New Jersey and met with DeAngelis and Benjamin Rotello, the Comptroller of Allied, in the Allied conference room. At that meeting DeAngelis advised defendants Bunge and Klein:

(a) That the warehouse receipts issued by Harbor Tank and given to Bunge as collateral for the $2,400,000 loan extended to Allied on September 26, 1962 were fraudulent in that there was not any soybean oil stored in the tanks designated in said warehouse receipts at the time of their issuance;

(b) That DeAngelis was short approximately $7,000,000 worth of oil at the Harbor Tank Field Warehouse;

(c) That DeAngelis and Allied had caused Harbor Tank to issue approximately $7,000,000 worth of fraudulent warehouse receipts which were then outstanding;

(d) That the Amexco Field Warehouse was validly operated, that there were no shortages of oil at the Amexco Field Warehouse and that the warehouse receipts issued by Amexco at said warehouse were not fraudulent.

19. In consideration for the agreement and/or understanding of defendants Bunge and Klein:

(a) Not to disclose the information alleged in paragraphs 16 and 18 (a), (b) and (c) to others including, but not limited to, appropriate law enforcement officials or regulatory agencies of the United States, New Jersey, New York or other interested jurisdictions; the management of Harbor Tank; persons, firms and corporations engaging in transactions with Allied involving Harbor Tank warehouse receipts and appropriate private organizations invested by law with self-regulatory responsibilities;

(b) Not to take any steps to enforce Bunge's rights with respect to the fraudulently issued Harbor Tank warehouse receipts then held by it; and

(c) To conceal and suppress information concerning the fraudulent activities of Allied in respect of the warehousing of oil and otherwise,

DeAngelis and Allied agreed to cause to be issued to Bunge by October 5, 1962 warehouse receipts issued by Amexco in substitution for most of the warehouse receipts of Harbor Tank which were then held by Bunge and to pay to Bunge the obligations secured by the Harbor Tank warehouse receipts not to be exchanged for receipts issued by Amexco. At that time Bunge and Klein knew or should have known that thenceforth DeAngelis and Allied would from time to time cause other and further fraudulent warehouse receipts to be issued by Harbor Tank at the Harbor Tank Warehouse and that such fraudulent Harbor

Tank warehouse receipts so issued would be transferred by Allied and DeAngelis to unsuspecting persons, firms and corporations in exchange for monies and other valuable considerations to or inuring to the benefit of Allied.

20. Pursuant to the aforesaid agreement and understanding and in furtherance thereof DeAngelis and Allied took back the Harbor Tank warehouse receipts held by Bunge on or about September 27, 1962 and by October 5, 1962 had replaced most of the Harbor Tank warehouse receipts previously held by Bunge with warehouse receipts of Amexco and had paid to Bunge the obligations secured by the Harbor Tank warehouse receipts not exchanged for receipts issued by Amexco and Bunge and Klein failed to report and reveal and did actively suppress and conceal the information alleged in paragraphs 16 and 18 (a), (b) and (c) among other ways, or follows:

(a) By wrongfully instructing Salmanowitz and Superintendence to keep the matter quiet;

(b) By immediately cancelling the full field audit it had scheduled of the oil it held as collateral from Allied atBayonne so as to prevent Superintendence from learning of the full extent of the shortage of Allied's oil at Bayonne; and

(c) By wrongfully failing to disclose such information to any law enforcement official or regulatory agency of the United States, New Jersey, New York or other interested jurisdiction, the management of Harbor Tank; persons, firms or corporations engaging in transactions with Allied involving Harbor Tank warehouse

receipts, including Haupt and banks with which Haupt dealt, or any private organization invested by law with self-regulatory responsibilities, all of which it was obligated to do.

21. Subsequent to September 27, 1962 Harbor Tank warehouse receipts covering commodities purportedly represented by the Harbor Tank receipts returned by Bunge as aforesaid and other fraudulent Harbor Tank warehouse receipts were transferred by Allied and DeAngelis to unsuspecting persons, firms and corporations dealing with Allied and DeAngelis, including Haupt, in exchange for monies and other valuable consideration worth many millions of dollars. On or about September 27, 1962, defendants Bunge and Klein knew or should have known that DeAngelis and Allied had caused to be issued and would continue to cause to be issued fraudulent Harbor Tank warehouse receipts and that unsuspecting persons, firms and corporations dealing with Allied and DeAngelis would accept such fraudulent warehouse receipts in exchange for many millions of dollars worth of money and other valuable consideration so as to cause severe damage and injury to such persons, firms and corporations.

22. In addition to the foregoing information about the criminal activities of Allied and DeAngelis alleged in paragraphs 16, 18(a), (b) and (c), Bunge and Klein received information during the period between September 1962 and November 1963 indicating that Allied and DeAngelis were still engaged in or were likely to be still engaged in criminal activities involving Harbor Tank warehouse receipts and otherwise and failed to disclose such information to any law

enforcement official or regulatory agency of the United States, New Jersey, New York or other interested jurisdictions; the management of Harbor Tank, other persons, firms or corporations engaging in transactions with Allied involving Harbor Tank warehouse receipts including Haupt and banks with which Haupt dealt, and appropriate private organizations invested by law with self-regulatory responsibilities.

23. The aforesaid concealments and failures to disclose of Bunge and Klein were tortious and constituted a violation by said defendants of Section 4 of Title 18 of the United States Code; Section 2a:97.2 of the New Jersey Penal Code; Section 570 of the New York Penal Law and comparable criminal statutes of other interested jurisdictions.

24. As a consequence of Bunge's and Klein's wrongful failures to disclose, concealments and suppressions subsequent to September 26, 1962 Allied and DeAngelis were able to continue in their false and fraudulent activities in respect of the warehousing of oil and otherwise and were also able to continue to issue or cause to be issued by Harbor Tank fraudulent warehouse receipts purportedly representing oil stored at the Harbor Tank Field Warehouse, which fraudulent warehouse receipts were transferred to persons, firms and corporations dealing with Allied, including Haupt, in exchange for monies and other valuable consideration, and Allied and DeAngelis were able to induce persons, firms and corporations, including Haupt, to deal with it in respect of warehouse receipts purportedly representing oil stored for it at the Harbor Tank Field Warehouses and otherwise.

25. Commencing on or about May 28, 1963 and continuing to and including on or about November 19, 1963 DeAngelis and Allied transferred to Haupt or to banks for Haupt's account a number of Harbor Tank warehouse receipts as security for loans made to Allied by Haupt or for margin for commodity futures transactions engaged in by Allied in which Haupt acted as Allied's broker and for which Haupt had to deliver margin to the commodity exchange involved.

26. Bunge and Klein knew or should have known subsequent to May 28, 1963 and prior to ovember 1963 that Haupt was dealing with Allied and DeAngelis in transactions involving Harbor Tank warehouse receipts.

27. On or about August 15, 1963 Haupt loaned to Allied $2,500,000 secured by Harbor Tank Warehouse Receipt B2227 having an indicated value of $3,572,100 which was designated for the account of and to be delivered to the First National City Bank of New York (hereinafter referred to as "First National City"). Said warehouse receipt was fraudulent in that the commodity for which it was issued as described in the warehouse receipt was not in fact stored in the Harbor Tank Field Warehouse.

28. Allied and Harbor Tank are insolvent and Allied has been adjudicated a bankrupt.

29. At the time of the bankruptcy of Allied fraudulent Harbor Tank Warehouse Receipt B2227 was held by First National City for the account of Haupt and the monies loaned by Haupt to Allied in reliance upon said receipt were

entirely unpaid. Haupt has been unable to realize any sums on said Harbor Tank warehouse receipt.

30. Were it not for the activities of Bunge and Klein and their false and fraudulent failures to disclose, concealments and suppressions, all as alleged above, Haupt would not have made the aforesaid loan or accepted said Harbor Tank warehouse receipt.

31. As a result of the foregoing Haupt has been damaged in the amount of $2,500,000.

AS AND FOR A SECOND CAUSE OF ACTION

32. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 30 as if more fully set forth herein.

33. On or about October 1, 1963 Haupt received Harbor Tank Warehouse Receipt B2265 having an indicated value of $817,912.50 which was designated for the account of and to be delivered to the Chase Manhattan Bank (hereinafter referred to as "Chase Manhattan") for the account of Haupt. Said warehouse receipt was credited as the cash equivalent of $490,800 of Allied's margin obligations to Haupt in connection with commodity futures transactions in which Haupt acted as Allied's broker. Said warehouse receipt was fraudulent in that the commodity for which it was issued as described in the warehouse receipt was not in fact stored in the Harbor Tank Field Warehouse

34. At the time of the bankruptcy of Allied fraudulent Harbor Tank Warehouse Receipt B2265 was held by Chase Manhattan for the account of Haupt and carried by Haupt

on its books as the cash equivalent of $490,800 of Allied's margin obligations to Haupt. Said margin obligation was not otherwise satisfied at the time of said bankruptcy. Haupt has been unable to realize any sums on said Harbor Tank Warehouse Receipt.

35. Were it not for the activities of Bunge and Klein and their false and fraudulent failures to disclose, concealments and suppressions, all as alleged above, Haupt would not have accepted said Harbor Tank Warehouse Receipt or credited Allied's account with the cash equivalent thereof.

36. As a result of the foregoing Haupt has been damaged in the amount of $490,800.

AS AND FOR A THIRD CAUSE OF ACTION

37. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 to 30 and 33 to 35 as if more fully set forth herein.

38. On or about October 3, 1963 Haupt received Harbor Tank Warehouse Receipt B2269 having an indicated value of $349,300 which was designated for the account of and to be delivered to Chase Manhattan for the account of Haupt. Said warehouse receipt was credited as the cash equivalent of $244,000 of margin obligations to Haupt in connection with commodity futures transactions in which Haupt acted as Allied's broker. Said warehouse receipt was fraudulent in that the commodity for which it was issued was not in fact stored in the Harbor Tank Field Warehouse.

39. At the time of the bankruptcy of Allied

fraudulent Harbor Tank Warehouse Receipt B2269 was held by Chase Manhattan for the account of Haupt and carried by Haupt on its books as the cash equivalent of $244,000 of Allied's margin obligations to Haupt. Said margin obligation was not otherwise satisfied at the time of said bankruptcy. Haupt has been unable to realize any sums on said Harbor Tank Warehouse Receipt.

40. Were it not for the activities of Bunge and Klein and their false and fraudulent failures to disclose, concealments and suppressions, all as alleged above, Haupt would not have accepted said Harbor Tank Warehouse Receipt or credited Allied's account with the cash equivalent thereof.

41. As a result of the foregoing Haupt has been damaged in the amount of $244,000.

AS AND FOR A FOURTH CAUSE OF ACTION

42. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 30, 33 through 35 and 38 through 40 as if more fully set forth herein.

43. On or about October 16, 1963 Haupt received Harbor Tank Warehouse Receipt B2277 having an indicated value of $105,000 which was designated for the account of and to be delivered to the National State Bank of Newark, Newark, New Jersey (hereinafter referred to as "National State") for the account of Haupt. Said warehouse receipt was credited as the cash equivalent of $74,100 of Allied's margin obligations to Haupt in connection with commodity futures transactions in which Haupt acted as Allied's broker. Said warehouse

receipt was fraudulent in that the commodity for which it was issued as described in the warehouse receipt was not in fact stored in the Harbor Tank Field Warehouse.

44. At the time of the bankruptcy of Allied fraudulent Harbor Tank Warehouse Receipt B2277 was held by National State for the account of Haupt and carried by Haupt on its books as the cash equivalent of $74,100 of Allied's margin obligations to Haupt. Said margin obligation was not otherwise satisfied at the time of said bankruptcy. Haupt has been unable to realize any sums on said Harbor Tank warehouse receipt.

45. Were it not for the activities of Bunge and Klein and their false and fraudulent failures to disclose, concealments and suppressions, all as alleged above, Haupt would not have accepted said Harbor Tank Warehouse Receipt or credited Allied's account with the cash equivalent thereof.

46. As a result of the foregoing Haupt has been damaged in the amount of $74,100.

AS AND FOR A FIFTH CAUSE OF ACTION

47. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 30, 33 through 35, 38 through 40 and 43 through 45 as if more fully set forth herein.

48. On or about October 18, 1963 Haupt received Harbor Tank Warehouse Receipt B2282 having an indicated value of $265,000 which was designated for the account of and to be delivered to Chase Manhattan for the account of Haupt. Said warehouse receipt was credited as the cash equivalent of

$175,000 of Allied's margin obligations to Haupt in connection with commodity futures transactions engaged in by Allied in which Haupt acted as Allied's broker. Said warehouse receipt was fraudulent in that the commodity for which it was issued as described in the warehouse receipt was not in fact stored in the Harbor Tank Field Warehouse.

49. At the time of the bankruptcy of Allied fraudulent Harbor Tank Warehouse Receipt B2282 was held by Chase Manhattan for the account of Haupt and carried by Haupt on its books as the cash equivalent of $175,000 of Allied's margin obligations to Haupt. Said margin obligation was not otherwise satisfied at the time of said bankruptcy. Haupt has been unable to realize any sums on said Harbor Tank warehouse receipt.

50. Were it not for the activities of Bunge and Klein and their false and fraudulent failures to disclose, concealments and suppressions, all as alleged above, Haupt would not have accepted said Harbor Tank Warehouse Receipt or credited Allied's account with the cash equivalent thereof.

51. As a result of the foregoing Haupt has been damaged in the amount of $175,000.

AS AND FOR A SIXTH CAUSE OF ACTION

52. Plaintiff repeats and realleges each and every allegation contained in paragraph 1 through 30, 33 through 35, 38 through 40, 43 through 45 and 48 through 50 as if more fully set forth herein.

53. On or about October 18, 1963 Haupt received Harbor Tank Warehouse Receipt B2283 having an indicated value of $49,000 which was designated for the account of and to be delivered to National State for the account of Haupt. Said

warehouse receipt was credited to the cash equivalent of $35,000 of Allied's margin obligations to Haupt, in connection with commodity futures transactions in which Haupt acted as Allied's broker. Said warehouse receipt was fraudulent in that the commodity for which it was issued as described in the warehous e receipt was not in fact stored in the Harbor Tank Field Warehouse.

54. Subsequently fraudulent Harbor Tank Warehouse Receipt B2283 was transferred from National State to Haupt. At the time of the bankruptcy of Allied it was held by Haupt as the cash equivalent of $35,000 of Allied's margin obligations to it. Said margin obligation was not otherwise satisfied at the time of said bankruptcy. Haupt has been unable to realize any sums on said Harbor Tank Warehouse Receipt.

55. Were it not for the activities of Bunge and Klein and their false and fraudulent failures to disclose, conccalments and suppressions, all as alleged above, Haupt would not have accepted said Harbor Tank Warehouse Receipt or credited Allied's account with the cash equivalent thereof.

56. As a result of the foregoing Haupt has been damaged in the amount of $35,000.

AS AND FOR A SEVENTH CAUSE OF ACTION

57. Plaintiff repeats and realleges each and every allegation contained in paragraph 1 through 30, 33 through 35, 38 through 40, 43 through 45, 48 through 50 and 53 through 55 as if more fully set forth herein.

58. On or about October 18, 1963 Haupt received Harbor Tank Warehouse Receipt B2286 having an indicated value of $150,700 which was designated for the account of and to be

delivered to National State for the account of Haupt. Said warehouse receipt was credited as the cash equivalent of $106,000 of Allied's margin obligations to Haupt. Said warehouse receipt in connection with commodity futures transactions in which Haupt acted as Allied's broker was fraudulent in that the commodity for which it was issued as described in the warehouse receipt was not in fact stored in the Harbor Tank Field Warehouse

59. At the time of the bankruptcy of Allied fraudulent Harbor Tank Warehouse Receipt B2286 was held by National State for the account of Haupt and carried by Haupt on its books as the cash equivalent of $106,000 of Allied's margin obligations to Haupt. Said margin obligation was not otherwise satisfied at the time of said bankruptcy. Haupt has been unable to realize any sums on said Harbor Tank Warehouse Receipt.

60. Were it not for the activities of Bunge and Klein and their false and fraudulent failures to disclose, concealments and suppressions, all as alleged above, Haupt would not have accepted said Harbor Tank Warehouse Receipt or credited Allied's account with the cash equivalent thereof.

61. As a result of the foregoing Haupt has been damaged in the amount of $106,000.

AS AND FOR AN EIGHTH CAUSE OF ACTION

62. plaintiff repeats and realleges each and every allegation contained in paragraph 1 through 30, 33 through 35, 38 through 40, 43 through 45, 48 through 50, 53 through 55 and 58 through 60 as if more fully set forth herein.

63. On or about October 23, 1963 Haupt received

cottonseed oils under their control at the Bayonne tank

Harbor Tank Warehouse Receipt B2287 having an indicated value of $192,000 which was designated for the account of and to be delivered to Chase Manhattan for the account of Haupt. Said warehouse receipt was credited as the cash equivalent of $134,400 of Allied's margin obligations to Haupt in connection with commodity futures transactions in which Haupt acted as Allied's broker. Said warehouse receipt was fraudulent in that the commodity for which it was issued as described in the warehouse receipt was not in fact stored in the Harbor Tank Field Warehouse.

64. At the time of the bankruptcy of Allied fraudulent Harbor Tank Warehouse Receipt B2287 was held by Chase Manhattan for the account of Haupt and carried by Haupt on its books as the cash equivalent of $134,400 of Allied's margin obligations to Haupt. Said margin obligation was not otherwise satisfied at the time of said bankruptcy. Haupt has been unable to realize any sums on said Harbor Tank Warehouse Receipt.

65. Were it not for the activities of Bunge and Klein and their false and fraudulent failures to disclose, concealments and suppressions, all as alleged above, Haupt would not have accepted said Harbor Tank Warehouse Receipt or credited Allied's account with the cash equivalent thereof.

66. As a result of the foregoing Haupt has been damaged in the amount of $134,400.

AS AND FOR A NINTH CAUSE OF ACTION

67. Plaintiff repeats and realleges each and every allegation contained in paragraph 1 through 30, 33 through 35, 38 through 40, 43 through 45, 48 through 50, 53 through 55, 58 through 60 and 63 through 65 as if more fully set forth herein.

68. On or about October 23, 1963 Haupt received Harbor Tank Warehouse Receipt B2289 having an indicated value of $118,500 which was designated for the account of and to be delivered to National State for the account of Haupt. Said warehouse receipt was credited as the cash equivalent of $83,000 of Allied's margin obligations to Haupt in connection with commodity futures transactions in which Haupt acted as Allied's broker. Said warehouse receipt was fraudulent in that the commodity for which it was issued as described in the warehouse receipt was not in fact stored in the Harbor Tank Field Warehouse.

69. At the time of the bankruptcy of Allied fraudulent Harbor Tank Warehouse Receipt B2289 was held by National State for the account of Haupt and carried by Haupt on its books as the cash equivalent of $83,000 of Allied's margin obligations to Haupt. Said margin obligation was not otherwise satisfied at the time of said bankruptcy. Haupt has been unable to realize any sums on said Harbor Tank Warehouse Receipt.

70. Were it not for the activities of Bunge and Klein and their false and fraudulent failures to disclose, concealments and suppressions, all as alleged above, Haupt would not have accepted said Harbor Tank Warehouse Receipt or credited Allied's account with the cash equivalent thereof.

71. As a result of the foregoing Haupt has been damaged in the amount of $83,000.

AS AND FOR A TENTH CAUSE OF ACTION

72. Plaintiff repeats and realleges each and every allegation contained in paragraph 1 through 30, 33 through 35,

38 through 40, 43 through 45, 48 through 50, 53 through 55, 58 through 60, 63 through 65 and 68 through 70 as if more fully set forth herein.

73. On or about October 25, 1963 Haupt received Harbor Tank Warehouse Receipt B2292 having an indicated value of $235,500 which was designated for the account of and to be delivered to National State for the account of Haupt. Said warehouse receipt was credited as the cash equivalent of $165,000 of Allied's margin obligations to Haupt in connection with Commodity futures transactions in which Haupt acted as Allied's broker. Said warehouse receipt was fraudulent in that the commodity for which it was issued as described in the warehouse receipt was not in fact stored in the Harbor Tank Field Warehouse.

74. At the time of the bankruptcy of Allied fraudulent Harbor Tank Warehouse Receipt B2292 was held by National State for the account of Haupt and carried by Haupt on its books as the cash equivalent of $165,000 of Allied's margin obligations to Haupt. Said margin obligation was not otherwise satisfied at the time of said bankruptcy. Haupt has been unable to realize any sums on said Harbor Tank Warehouse Receipt.

75. Were it not for the activities of Bunge and Klein and their false and fraudulent failures to disclose, concealments and suppressions, all as alleged above, Haupt would not have accepted said Harbor Tank Warehouse Receipt or credited Allied's account with the cash equivalent thereof.

76. As a result of the foregoing Haupt has been damaged in the amount of $165,000.

of Harbor Tank warehouse receipts.

CERTIFICATION IN LIEU OF OATH
OR AFFIDAVIT

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment for contempt of court.

CHARLES SELIGSON as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt.

DATED:

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 920-68

CHARLES SELIGSON, as Trustee in Bankruptcy of Ira Haupt & Co., a Limited Partnership, Bankrupt,

Plaintiff,

v.

BUNGE CORPORATION and WALTER C. LUBAN,

Defendants.

OPINION

APPEARANCES:

COLE, BERMAN & GARTH, Esqs.
By: A. PAUL VICTOR, Esq. (N. Y. Bar)
Attorneys for Plaintiff

LUM, BIUNNO & TOMPKINS, Esqs.
By: WILLIAM F. TOMPKINS, Esq.
Attorneys for Defendants.

WHIPPLE, District Judge:

The plaintiff brings this motion pursuant to 28 U.S.C. § 1447(c) seeking to remand this action to the Superior Court of New Jersey, Law Division, Essex County, allegedly because the complaint does not present a claim or right arising under the Constitution, treaties or laws of the United States.

This action was commenced in the Superior Court of New Jersey, Law Division, Essex County (Docket No. L-41821-67) on August 13, 1968 and was removed by defendant to this court on September 12, 1968.

Plaintiff basically relies on two points in support of its position: (1) no federally granted right or immunity is

[illegible] essential element of plaintiff's cause of action; (2) the allegation of a violation of a federal statute as part of a claim sounding in common law has been frequently held not to give a federal court federal question jurisdiction.

Defendant argues: (1) if the plaintiff is contending that the complaint was designed to plead a claim exclusively under the common law of torts, and not under federal law, it should be noted that this does not appear in the complaint; (2) it is apparent from the network of references to federal law in the complaint that one ground of recovery asserted thereby is an implied right to civil recovery based upon 16 U.S.C. § 4.

Specifically, the defendant points to Count 1 of the complaint, and in particular, paragraphs 10, 19(a), 20(c), 22 and 23.

The general rule is that the existence of a federal question depends on the complaint as pleaded. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672 (1950). In order to establish federal question jurisdiction for removal under 28 U.S.C. § 1441, this federally created right must be an essential element of plaintiff's cause of action. Gully v. First National Bank in Meridian, 299 U.S. 109 (1936). Additionally, the question does not "arise under a federal law" unless it substantially involves a dispute respecting the validity, etc. of such law, upon the determination of which the result depends. See Shulthis v. McDougal, 225 U.S. 561, 569 (1912).

As the Supreme Court noted in Bell v. Hood, 327 U.S. 678, 681 (1946), in making a determination as to removability, the plaintiffs' complaint must be read to ascertain what are the real issues presented. " * * *[T]he district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States."

therefore, if is plaintiff's complaint, unaided by the petition for removal which must disclose the presence of a federal question.

In the case of Deming v. Darrid, et al., 162 F.2d 654, 655-56 (3d Cir. 1947), Judge Goodrich stated:

> " * * * It is apparent that the question which we have to settle is whether the plaintiff has stated a basis for recovery under the federal statute just mentioned, [Public Utility Holding Company Act of 1935]. If he has, the fact that he also asserts a non-federal ground does not lose him his privilege of suing in the federal court. On the other hand, if the substance of his claim is one based on state law, the reference to the federal statute is not enough to bring him into federal court, unless he has independent grounds for coming there."

After a discussion of the nature of the pleadings, the court concluded that there was not a causal connection between the federal violation and the injury claimed.

Similarly, in Doncek, et al. v. Pennsylvania R.R., 105 F. Supp. 700, 705-06 (D.C. N.J. 1952), one of the charges of negligence was a failure to comply with federal regulations. In particular, the exact language referred to in Count 5 of the complaint of one of the co-plaintiffs, (Chemical) states, " * * * contrary to and in violation of the applicable statutes and regulations of the United States and the State of New Jersey and applicable municipal ordinances * * * *." The court concluded that the action of negligence was premised on the law of New Jersey and that no recovery was sought under and by virtue of the provisions of any federal statutes or regulations. See also Owens v. New York Central R.R., 267 F.Supp. 252 (E.D. Ill. 1967).

This court has carefully examined and analyzed the plaintiff's complaint, the briefs submitted and has had the benefit of oral argument, and is of the opinion and so rules that the basis for this action revolves about the tortious conduct of the defendant

rather than the validity or construction of a federal statute. The federal question sought to be raised by the complaint is merely incidental to the nub of this cause of action rather than being a substantial claim founded directly upon federal law. Bell, supra; Gully, supra. Although the complaint makes reference to alleged and inferential violations of federal statutes, the substance of the claim is based upon a common law action for tort which does not give rise to a claim or right arising under the Constitution, treaties or laws of the United States.

This court finds that the cause of action was improperly removed to this court and therefore will remand same to the Superior Court of New Jersey, Law Division, Essex County, without costs.

An appropriate order in conformity with the foregoing opinion shall be submitted.

LAWRENCE A. WHIPPLE
United States District Judge

BRIEF OF PLAINTIFF

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION
ESSEX COUNTY DOCKET NO. L-41821-67

Charles Seligson, as Trustee in Bankruptcy of Ira Haupt & Co., a Limited Partnership, Bankrupt,)
Plaintiff,)
vs.)
Bunge Corporation, et al.,)
Defendants.)

BRIEF OF PLAINTIFF

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TABLE OF CONTENTS

TITLE	PAGE NO.
THE FACTUAL SETTING	1
A. Preliminary Statement	1
B. Haupt's Relationship With Allied	4
C. Bunge's Relationship With Allied	9
1. Events Leading Up To The September, 1962 Incident	9
2. The September, 1962 Incident	15
3. Bunge's Activities After The September, 1962 Incident	22
THE LAW	25
A. Introduction	25
B. Defendants' Silence Is Fraudulent	28
1. Defendants Had A Duty To Disclose Their Knowledge Of Allied's And DeAngelis' Illegal Activities To State And Federal Officials	30
2. Klein Had A Duty To Disclose His Knowledge Of Allied's And DeAngelis' Activities To The New York Produce Exchange	35
C. Defendants Aided And Abetted Allied's Fraudulent Scheme	38
D. Defendants In Order To Recover The Value Of The Fraudulent Receipts Intentionally Injured Haupt	45
E. Defendants Knew Or Should Have Known That As A Result Of Their Conduct Innocent Victims Would Be Damaged	49
CONCLUSION	54

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION
ESSEX COUNTY DOCKET NO. L-41821-67

Charles Seligson, As Trustee in Bankruptcy of Ira Haupt & Co., a Limited Partnership, Bankrupt,)
Plaintiff,)
vs.)
Bunge Corporation, et al.,)
Defendants.)

BRIEF OF PLAINTIFF

THE FACTUAL SETTING

A. Preliminary Statement

This action arises out of the financial disaster which befell Ira Haupt & Co. ("Haupt") as a result of the "Great Salad Oil Swindle" uncovered in November, 1963. Charles Seligson, Trustee in Bankruptcy of Haupt ("Trustee"), the plaintiff in this action, will demonstrate that Bunge Corporation ("Bunge") and its President and Chief Executive Officer, Walter C. Klein ("Klein"), as well as other Bunge executives knew and participated in the concealment of certain fraudulent activities

(as well as other crimes) [1] by Allied Crude Vegetable Oil Corp. ("Allied") and its Chief Executive Officer, Anthony "Tino" DeAngelis ("DeAngelis") which directly resulted in the liquidation and subsequent bankruptcy of Haupt.

As a result of certain information that was disclosed to Bunge and Klein ("defendants") on September 27 and 28, 1962, the defendants knew about the fraudulent activities being perpetrated by Allied and DeAngelis at the field warehouses maintained by Harbor Tank Storage Co. ("Harbor Tank"). As of September 28, 1962, Bunge and Klein knew that DeAngelis and Allied would from time to time thereafter cause fraudulent warehouse receipts to be issued by Harbor Tank and that such fraudulent Harbor Tank warehouse receipts would be transferred by Allied and DeAngelis to unsuspecting persons, firms and corporations in exchange for monies and other valuable considerations inuring to the benefit of Allied. Defendants not only concealed these facts from appropriate law enforcement officials who, if they had known the facts, would have conducted

1/ Defendants concealed the following crimes arising under state and federal law: forgery; assualt with a deadly weapon; conspiracy; bribery; fraudulent use of the mails and obtaining money under false pretenses.

investigations into Allied's conduct, but, in order to recover monies loaned by Bunge to Allied, aided and abetted the fraudulent scheme by (1) cancelling a full field audit of the Harbor Tank field warehouse which would have led to discovery of the fraud, (2) instructing certain third parties to keep silent, and (3) failing to transmit the material facts to law enforcement officials and regulatory agencies having jurisdiction thereof. As a direct result of defendants' conduct, Haupt has been tortiously injured by defendants in the amount of $4,007,300 representing the sums loaned to Allied by Haupt secured by the fraudulent Harbor Tank warehouse receipts.

Before focusing on defendants' tortious activities, it is necessary to briefly describe the events leading up to and following "the September 1962 Incident" and its effect on Haupt as well as other innocent persons, firms and corporations. As all of the facts surrounding the collapse of Allied, its subsidiaries and the financial ruin of numerous individuals, firms and corporations have been extensively documented in a series of court cases involving hundreds of parties, they will not be reproduced in full here.

B. Haupt's Relationship With Allied

Haupt was a limited partnership engaged in a general brokerage and commission business.

Allied was a corporation ostensibly engaged in the business of refining, storing and selling soybean and cottonseed oils and other products. Allied's main plant and "tank farm" were located in Bayonne, New Jersey. Allied owned extensive refining facilities and leased storage tanks in Bayonne in which it refined and stored its oil. Allied, in turn, subleased the storage tanks to American Express Warehousing, Ltd. ("Amexco"), a subsidiary of American Express Co. and to Harbor Tank, two field warehousing concerns. Both Amexco and Harbor Tank issued warehouse receipts 2/ certifying the purported presence of soybean and

2/ Warehouse receipt -- a document signifying ownership of a specified quantity of a commodity of specific grade located at a specific storage site. The receipt is issued by the person or firm that is charged with the keeping of the commodity. Warehouse receipts may be registered for delivery on an exchange or they may be field receipts.

Registered warehouse receipts are those issued by warehouses which are licensed by the exchange on which the commodity evidenced by the receipt is traded; such licensing establishes that the warehouse has been inspected by the exchange and that it meets the exchange's

(Cont'd.)

cottonseed oils under their control at the Bayonne tank facilities.

On May 28, 1963, Allied entered into an agreement with Haupt whereby Haupt agreed to act as Allied's broker. Pursuant to this agreement, Allied maintained three accounts with Haupt as follows:

(i) An export loan account (Account No. 89-002125) which reflected, inter alia, credits for loans granted to Allied and debits for repayments thereof.

(ii) A regulated account (Account No. 89-001630-1) maintained pursuant to the regulations of the Commodity Exchange Act which reflected, inter alia, (1) as credits the receipts

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2/ (Cont'd.)

standards, financial and otherwise. Such receipts can be tendered on an exchange.

Non-registered field warehouse receipts are those issued by a warehouse not licensed by an exchange nor subject to the exchange's requirements. Such receipts cannot be tendered on an exchange. Non-registered warehouse receipts were those issued by Harbor Tank and then sent to Haupt by Allied.

of cash margin[3], the amounts attributable to product margin[4] transferred from the non-regulated account and the gains on

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3/ Cash margin -- the funds put up as security or a guarantee of contract fulfillment. Margin in the commodities market should be distinguished from margin in the securities market (which represents a percentage of the purchase price of the security) for they are entirely different concepts.

There are two types of cash margin, original and variation:

(1) Original margin is the deposit of funds required upon the purchase or sale of the futures contract. Depending upon the exchange and the commodity involved, if the purchaser or seller of the contract is acting to hedge a position in the actual commodity, he is not always required to deposit original margin. In any case, such margin is usually required of a "speculator" (i.e., one who engages in futures transactions not for the purpose of hedging but rather to effect a profit). Nevertheless, a broker may if he wishes request original margin from a hedge customer, as Haupt did with Allied.

(2) Variation margin is the deposit of funds made necessary by adverse price fluctuation. Such margin is required of both hedge customers and speculators. Thus if the purchaser or seller's equity falls below a certain point, usually a certain percentage of the original margin deposited, he is required to restore the original margin. If, on the other hand, the purchaser or seller has experienced a favorable price fluctuation so that his equity is in excess of the original margin required to be on deposit, he may be entitled to the release of the excess margin.

4/ Product margin -- the payment of original margin to the broker through the use, in whole or in part, of ware-

(Cont'd.)

closed futures transactions, and (2) as debits the release of excess margin and losses on closed futures transactions.

(iii) A non-regulated account (Account No. 89-001630-2) reflected transactions relating to commodities not reflected in (i) and (ii) above, including, inter alia, (1) as credits the receipt of cash for spot oil[5/] and (2) as debits charges for the delivery of spot oil and transfers to the regulated account of the dollar amount attributable to product margin.

As security for the loans and as product margin payments, Allied transferred to Haupt or to banks for Haupt's account a number

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4/ (Cont'd)

house receipts evidencing some commodity, or "product" in lieu of cash. In the case of Haupt, it would accept from Allied warehouse receipts evidencing cottonseed and soybean oil and purportedly issued by Harbor Tank in connection with original margin required for transactions on the New York Produce Exchange and the Board of Trade of the City of Chicago.

5/ Spot Oil -- the actual or physical oil as opposed to oil futures.

of Harbor Tank warehouse receipts.

Between August 15, 1963 and October 25, 1963, Haupt entered into specific financial transactions with Allied whereby Haupt made export loans to Allied which were secured by Harbor Tank warehouse receipts and made margin payments on behalf of Allied for which it accepted as product margin Harbor Tank warehouse receipts. These warehouse receipts numbered B-2227, B-2265, B-2269, B-2277, B-2282, B-2283, B-2286, B-2287, B-2289, and B-2292, unbeknownst to Haupt, were all fraudulent in that the commodity described in the warehouse receipts was not, in fact, stored in the Harbor Tank field warehouse. Each warehouse receipt was designated for and delivered to either the First National City Bank of New York, the Chase Manhattan Bank (N.A.), or the National State Bank of Newark as collateral for monies loaned to Haupt.

As a direct result of Allied's fraudulent activities, both Allied and Harbor Tank became insolvent and Allied in November, 1963 filed a petition of bankruptcy. At the time of the petition of bankruptcy of Allied, a debit of $4,007,300 was carried by Haupt on its books as the cash equivalent of Allied's export loan or product

margin obligations to Haupt which were secured by the fraudulent Harbor Tank warehouse receipts. Said obligations have not been satisfied and Haupt has not yet been able to realize any sums from Allied secured by the Harbor Tank warehouse receipts. As a result of Allied's fraudulent activities, concealment thereof and other fraudulent activities, Haupt found itself in dire financial straits which caused it to be first liquidated, and then adjudicated a bankrupt in June, 1964. This, in turn, resulted in the loss of jobs for its over seven hundred employees and the personal bankruptcy of all of its general partners as well as the loss of over $30,000,000 including the $4,007,300 which had been secured by the fraudulent warehouse receipts.

C. Bunge's Relationship With Allied

1. Events Leading Up To The September, 1962 Incident

Bunge, an export company, forms a small part of the "Bunge group" of worldwide trading organizations whose headquarters are in Buenos Aires, Argentina. Bunge is wholly-owned by the Los Andes Corporation, a foreign corporation incorporated in Curacao, Netherlands Antilles.

Essentially five executives of Bunge were responsible for the supervision of transactions between Bunge

and Allied. They were:

(i) Walter C. Klein, President,

(ii) Hamilton G. Kenner ("Kenner"), Chief Counsel;

(iii) Harry D. Fornari ("Fornari"), a Vice President of the Fats and Oils Division;

(iv) Richard Forti ("Forti"), a Vice President of the Fats and Oils Division;

(v) Carl E. Groeneveld ("Groeneveld"), the Senior Traffic Manager of the Bunge Oil Department.

From approximately 1959 to 1963, Bunge conducted an enormous amount of business with Allied by, inter alia; (1) extending to Allied loans of many millions of dollars which were secured by warehouse receipts issued by Harbor Tank and American Express, (2) purchasing refined vegetable oil from Allied for resale to third parties, and (3) selling crude vegetable oil to Allied for refining.

The initial financing arrangements between Bunge and Allied commenced in 1960. A memorandum from Fornari and Forti to the management of Bunge dated March 30, 1960, set forth Allied's then existing financing arrangements with other companies (North American Continental, Garnac Grain Company,

Gersony-Strauss and Isbrandtsen), and recommended that Bunge extend inventory financing to Allied.

A letter dated April 4, 1960, from Bunge to Allied confirming the initial terms of the inventory financing arrangement provided in essence that Bunge would loan certain amounts of money to Allied upon the pledge of warehouse receipts up to the extent of 80 percent of their market value. At the outset, oil covered by the warehouse receipts delivered to Bunge as security for its loans to Allied was contained in a non-designated tank and was commingled on a fungible basis with oil belonging to holders of other warehouse receipts.

Allied and Bunge had little or no problems during the early period of their relationship. Allied supplied most of the approximately $100,000,000 worth of vegetable oil Bunge exported each year and Bunge advanced up to $20,000,000 at a time to Allied. The business transactions between Bunge and Allied were generally profitable to Bunge and unprofitable to Allied.

The first instance indicating concern by Bunge with the handling of inventory and the issuance of warehouse

receipts at the Bayonne warehouses occurred in early January, 1962. As a result of a certain comment by Groeneveld (made in connection with a delay in the loading of an oil tanker at the Harbor Tank field warehouse) that he had "absolute final proof of [Allied's] fraud", Bunge caused an independent surveying company, Superintendence Company, Inc. ("Superintendence") to take a physical inventory of all fats and oils pledged by Allied for Bunge's account. An inventory was conducted at all the terminals at which fats and oils were stored by Allied. Since fats and oils not financed by Bunge were stored in the same installations on a commingled basis, Superintendence and A.M. Juge Co., a second surveying company, inventoried the entire stock of fats and oils. As a result of the survey, the existence of the pledged oil was confirmed.

In early July of 1962, Fornari, after an initial inquiry into the state of Bunge's insurance coverage, spoke with Edward Schroeder ("Schroeder"), Bunge's insurance officer about procuring additional protection for Bunge in the amount of $30,000,000. This represented a sudden change from Bunge's past acceptance of insurance coverage

by Allied for Bunge's benefit to extensive coverage by Bunge for its own account. A letter from Alfred Norton, Inc. Insurers to Schroeder dated August 22, 1962, confirmed discussions with Bunge that the All Risk insurance policy issued to Allied would cover unexplained shortages or shortages resulting from theft and/or conversion on the part of the employees of the storage company (Amexco and Harbor Tank) or the depositor (Allied).

During the summer of 1962, Klein sought to reduce Bunge's loan position with Allied. This led to a series of correspondence between Klein and DeAngelis in September of 1962. In a letter dated September 7, 1962, Klein requested full details of DeAngelis' business operations. Kenner subsequently sent a memorandum dated September 19, 1962 to Klein stating that if Bunge was to continue its large scale financing of Allied, certain activities would have to be done by Bunge to police the Allied account including: (1) monthly audits of Allied's records to be conducted by Haskin & Sells, (2) a review of all of Allied's field warehousing activities, (3) monthly financial reports from Allied and (4) monthly surveys of all pledged merchandise to be conducted by Superintendence.

In a letter agreement dated September 26, 1962, Allied in return for Bunge's financing $12 million worth of various oils as requested by DeAngelis, (1) agreed to repay Bunge $2 million prior to October 5, 1962, by redeeming oil then pledged to Bunge under the revolving account arrangement; (2) authorized the deposit of checks in the amount of $5 million then held by Bunge, such checks to be deposited at the rate of $1 million a day commencing October 1, 1962; and (3) agreed to take over all merchandise purchased by Bunge and sold to Allied which was not then shipped, and to pay for such merchandise within one week after payment by Bunge. In addition, Allied guaranteed Bunge 100,000 tons of business prior to December 31, 1962, without additional financing and guaranteed the reduction of all outstanding loans to a sum not to exceed $10 million by November 30, 1962.

For the next crop year, Allied also guaranteed Bunge new business of 400,000 tons with a guaranteed profit of $2 per ton. In this regard, the agreement provided that if the sales did not in fact reach the intended amount (the 400,000 tons in 1963 plus the 100,000 in 1962), the margin per ton was to be increased so as to provide Bunge

with a minimum total remuneration of $1 million in any case. Finally, Allied agreed to permit Bunge to conduct a monthly audit and survey of all pledged merchandise and to provide Bunge with monthly reports showing information on its position in the cash and futures market, stocks of oils pledged to others, and other financial information.

No monthly audits were ever conducted and the only survey undertaken was cancelled by Bunge before completion. Bunge was aware of the cost of oil to Allied and the price on the sales of that oil by Allied. The Trustee will show that Bunge knew that Allied was losing money on every sale to Bunge because of the financing charges Allied was required to pay Bunge and others, and Bunge's insistance on a minimum profit of $2 per ton.

2. The September 1962 Incident

On September 26, 1962, as part of the program whereby Bunge would be extending large scale financing to Allied, Bunge loaned $2,400,000 to Allied and received as security two Harbor Tank receipts. As a preliminary step, Fornari instructed Superintendence to make a complete

anyone.

survey of the Harbor Tank and Amexco oil tanks at Bayonne in which oil purportedly represented by the warehouse receipts held by Bunge was stored. On September 26, 1962, Fornari told DeAngelis that Bunge would conduct such a survey and that Superintendence would initially inspect two Harbor Tank tanks numbered 5084 and 5087 at Bayonne that supposedly held over 32,000,000 pounds of oil as described in the two aforesaid receipts.

That afternoon Daniel Byrne ("Byrne") and James Lapanna ("Lapanna"), two Superintendence surveyors, attempted to inspect the two tanks. At Bayonne, Byrne and Lapanna after some delay met with the Harbor Tank custodian, Joseph Lomuscio ("Lomuscio") and requested that he take them to the two tanks. Lomuscio declined and instead asked them to accept for the time being certain figures which he would furnish to them and return the next day to inspect the tanks. The surveyors refused to do this. Lomuscio then removed a gun from his desk and threatened the Superintendence surveyors with it.

The surveyors then went to the Allied office and demanded to see the tanks. Lapanna was ushered into the office of DeAngelis. DeAngelis said that there had been

a mixup in transferring oil to the two tanks; that the surveyors should accept Lomisco's figures, and that they could come back the next day to inspect the tanks. Lapanna objected to this procedure noting that Allied had not done any favors for Lapanna. DeAngelis then gave Lapanna a check for $25,000 drawn to Lapanna's order which Lapanna accepted. Thereafter Lapanna accepted the Harbor Tank computations and samplings and the Superintendence employees left.

That evening, Lapanna called William Boecking ("Boecking"), a Superintendence Vice President, and told him what had transpired at Bayonne that day. Boecking, in turn, informed Jules Salmonowitz ("Salmonowitz"), President of Superintendence. Klein, Forti and Fornari admitted in their deposition testimony that on the next morning, September 27th, Salmonowitz, Boecking and Lapanna appeared at the Bunge office and told Fornari in detail what had transpired on September 26, 1962 at Allied. Fornari thanked the Superintendence group for the information and said that Bunge would look into the situation. Fornari then dismissed the Superintendence group and then unsuccessfully attempted to stop payment on the $2,400,000 check which Bunge had delivered to Allied on September 26, 1962.

Fornari next phoned DeAngelis for an explanation of the incident. DeAngelis stated that there had been a mixup, that he could explain everything, and that the Bunge officials would be welcomed at Allied if they wanted to come to Bayonne to discuss the situation. Fornari reported these events to Klein and then Fornari, Forti, Groeneveld and Carpentieri (an employee in Bunge's traffic department) drove over to Bayonne to see DeAngelis.

The Bunge officials met with DeAngelis at the Allied office in Bayonne where DeAngelis explained that the reason that the two Superintendence surveyors had not been able to inspect the tanks described in the warehouse receipts delivered to Bunge on September 26, 1962, was that the tanks contained no oil because a mistake had been made. DeAngelis indicated that if Bunge was unhappy about the Harbor Tank operation that plenty of free oil existed in the Amexco warehouse. Fornari told DeAngelis that the Bunge group would like to satisfy themselves that free oil, in fact, existed at the Amexco warehouse. The four Bunge employees then walked over to the Amexco offices where Groeneveld and Forti looked over the shoulder of the Amexco custodian and glanced at some Amexco inventory sheets.

Fornari and Carpentieri then proceeded to the oil tanks and Fornari physically inspected the aforesaid tanks in order to satisfy himself that free oil did exist. At the same time, Forti and Groeneveld satisfied themselves from the Amexco records that there was more than enough oil in the Amexco tanks to cover the two Harbor Tank receipts in question from the previous day. The Bunge officers told DeAngelis that they wanted to have nothing to do with Harbor Tank warehouse receipts and that they wanted only Amexco warehouse receipts. Thereafter, the Bunge officers left the Bayonne facilities.

On the morning of September 28, 1972, as the Trustee will prove, Klein accompanied by Kenner, Fornari, Forti and Goreneveld, went to Allied to confront DeAngelis and demand a complete explanation of the incident with the two surveyors. DeAngelis advised the Bunge officials that Allied was short approximately $7 million worth of oil, that the posting of Allied's records was six months behind, and that the two tanks allegedly containing oil to collateralize the $2.4 million loan of September 26, 1972 from Bunge to Allied had in fact no oil. DeAngelis confessed that the Harbor Tank warehouse receipts purporting to represent oil

were fraudulent because no oil of the type and grade specified in the receipts was in the tanks. The Bunge officials asked DeAngelis what he was going to do about getting Bunge out of its predicament. DeAngelis stated that there was one possible solution.

DeAngelis advised the Bunge officials that the warehouse receipts issued by Amexco were valid. He then agreed with the Bunge officials that if they would keep the entire incident quiet, he would arrange for the orderly switch of fraudulent Harbor Tank warehouse receipts then held by Bunge for bona fide Amexco warehouse receipts.

Pursuant to this understanding, DeAngelis (1) took back the Harbor Tank warehouse receipts held by Bunge as of September 28, 1962, and had replaced most of the Harbor Tank warehouse receipts previously held by Bunge with Amexco warehouse receipts as of October 5, 1962, and (2) paid to Bunge those obligations secured by the Harbor Tank warehouse receipts not exchanged for Amexco warehouse receipts.

As the Trustee will prove, upon learning of Allied's fraudulent activities, Bunge and Klein not only failed to

report and reveal the events which took place between September 26th and 28th, 1962, but actively suppressed and concealed the events:

(a) By wrongfully instructing Salmonowitz and Superintendence to keep the matter quiet when Salmonowitz returned to Klein's office for instructions on or about September 30, 1962.

(b) By immediately cancelling the full field audit it had scheduled of the oil held by Bunge as collateral so as to prevent Superintendence from learning of the full extent of the shortage of Allied's oil at Bayonne; and

(c) By wrongfully failing to disclose the facts to any law enforcement official of the United States, New Jersey, or other interested jurisdiction; the New York Produce Exchange; the management of Harbor Tank; persons, firms or corporations engaging in transactions with Allied involving Harbor Tank warehouse receipts, ultimately including Haupt and banks with which Haupt dealt; or any private organization invested by law with self-regulatory responsibilities.

Subsequent to September 27, 1962, Harbor Tank warehouse receipts covering commodities purportedly stored at Harbor Tank were returned to Allied by Bunge and as a

direct result other fraudulent Harbor Tank warehouse receipts were issued by Allied and DeAngelis to unsuspecting firms dealing with Allied and DeAngelis, including Haupt, in exchange for monies and other valuable consideration.

3. Bunge's Activities After The September 1962 Incident

After learning the fraudulent nature of the Harbor Tank warehouse receipts, Bunge consummated its understanding with Allied by exchanging the Harbor Tank receipts for Amexco receipts. Bunge then took additional steps to insure that the Amexco receipts were genuine and that it had the necessary insurance covering to protect itself against financial losses due to missing oil. Thus, in a series of letters and memoranda in October and November, 1962, Bunge confirmed its insurance status. Then, for the first time in November, 1962 Bunge insisted on segregation of the oil financed by Bunge into specific tanks at Amexco without commingling with the oil of other persons engaged in financing Allied plus a certificate from Superintendence verifying the inventory represented by the Amexco warehouse receipts given as collateral to Bunge.

Bunge's concern with Allied and the Amexco warehouse receipts is reflected in two memoranda circulated among the executives of Bunge. On March 21, 1963, Forti and

Fornari sent a memorandum to Klein and Kenner. This memorandum dealt with the liquidation of Allied's outstanding loans and the question of whether Bunge was to resume business with Allied after the loans had been liquidated. Paragraph 5 of the memorandum stated "do we intend to make a new, full, exhaustive investigation of the situation with American Express or do we exclude a priori any financing of any oil at Bayonne." Paragraph 5(e) of the memorandum then stated that "[t]he fundamental decision, however, is whether we want to continue working with Allied (subject to our obtaining better and safer conditions), or we will run (sic) our business in competition with Allied." (Underscoring appears in the original document.)

A memorandum dated May 1, 1963 entitled "Future Relationship with Allied" discussed Bunge's future plans. In Paragraph 4(c) of this memorandum it is stated that the "[f]inancing of oil at Bayonne should be considered sproadically and only under the following conditions:

1. Suitable collateral in terms of quantity and quality ("new American Express terms"), plus notes and, possible checks.

2. Time limit - 30 days.

3. Amount limit - $5,000,000." (Underscoring appears in the original document.)

Bunge's concern with conditions at Amexco continued. After receiving a balance sheet of Allied as of August 30, 1963, Forti and Fornari stated to Klein in a memorandum dated October 9, 1963: "[W]e have received (for whatever it's worth) the statement which we requested from Tino (for comparison purposes we are also attaching the previous one)." (Emphasis supplied.) Two memoranda dated November 8, 1963 and November 12, 1963, respectively, indicate that Bunge was placing greater reliance on the insurance coverage on the oil at Bayonne than on the proper administration of warehousing. In the memorandum of November 8, 1963 from Fornari and Forti to Klein, indicated that they had obtained a copy of the Fidelity bond covering the field warehouse in Bayonne in the amount of $3,500,000 and were of the opinion that the terms of the bond provided satisfactory insurance. It also mentioned that Bunge's procedure of storage tank identification and product inspection in connection with each warehouse receipt also provided substantial safeguards.

It is submitted that from the discussion of the applicable law as follows, the Court must conclude that Bunge

and Klein (1) had an affirmative obligation to disclose their knowledge of the fraudulent activities conducted by Allied and DeAngelis to the appropriate regulatory bodies and law enforcement officials, (2) by their instructions to Superintendence and Salmonowitz aided and abetted the aforesaid fraudulent activities, and (3) intentionally exposed Haupt to a known, unreasonable risk of harm.

THE LAW

A. Introduction

The conduct of Bunge and Klein as demonstrated above clearly fulfills the requirements needed for a finding of liability under the classic torts of fraudlent concealment, violation of statutory duty, and wanton misconduct as well as a recently developed tort - "prima facie" tort. Moreover, in an era where fraudulent activities, cover ups, and concealments are becoming more and more prevalent, the law of torts has been expanded to hold defendants liable for nameless torts because, as here, some of their tortious activities cannot be neatly categorized into traditional tort theories. Because of the complexity of the facts leading up to and culminating in the financial downfall and ultimate bankruptcy of Haupt, the Trustee will combine the traditional tort elements with the newly developed ones in his allegation of defendants' liability.

The mere fact that a cause of action contains newly developed tort concepts, in addition to the well-settled tort concepts, should not deter a Court from finding liability where, as here, the plaintiff has suffered substantial injuries from a defendant's conduct. As Dean Prosser has stated:

> "New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before ... The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy." Law of Torts, 3rd Ed. §1, pp. 3-4 (1964).

The courts of both New York and New Jersey have in recent years found tort liability in situations where, as here certain of the facts cannot be easily pidgeon-holed into one traditional theory or another. Thus, in Morrison v. National Broadcasting Company, Inc., 24 A.D. 2d 284, 266 N.Y.S. 2d 406 (1st Dept. 1965), rev'd on other grounds, 19 N.Y. 2d 453, 280 N.Y.S. 2d 641 (1967), the Appellate Division faced with a unique factual situation, a case of first impression, found tortious liability because, as here, each element of plaintiff's claim combined "a recognized element in the law of remedies [torts]" (at 287). As Judge Breital said:

> "In short, and in repetition, every element in plaintiff's claim descriptive of defendants' acts, his reliance, and the harm sustained, are indentifiable in the most ancient of the tort categories and in the law of negligence. What is more important, the elements of defendants' conduct and the harm to plaintiff fall neatly within general principles of law, even if not within any of the numbered forms of a form book. The intentional use of wrongful means and the intentional exposure of another to the known, unreasonable risk of harm which results in such harm, provides classic basis for remedy." (at p. 288). (Emphasis supplied).

Similar language can be found in a case recently decided by this Court relying, in part, on the Morrison case. In Seidel v. Greenberg, 108 N.J. Super. 248 (Law 1969), in a situation similar to the one here and to the one in Morrison, supra, the Court was faced with a complaint containing elements of several torts. In denying defendants' motion to dismiss the Court held:

> "It is axiomatic that the simple fact that his [plaintiff] action does not fit into a nicely defined or established 'cubby hole' of the law does not in itself warrant the denial of relief to him" (at 256-57) (Citations omitted).

In the instant case, the Trustee submits that the defendants (1) have fraudulently concealed the facts of the September, 1962 Incident from the appropriate law enforcement

authorities and regulatory agencies, (2) aided and abetted Allied by taking affirmative steps to insure that the facts would be suppressed and not be discovered by third parties, and (3) intentionally used wrongful means to protect their own interest and, thus, intentionally exposed firms such as Haupt to a known, unreasonable risk of harm, all of which resulted in the tortious harm to Haupt in the amount of $4,007,300.

B. Defendants' Silence Is Fraudulent

It is the settled law of New Jersey that silence is fraudulent when there is a duty to disclose. Nicholson v. Janeway, 16 N.J. Eq. 285, 287 (Chan. 1863); Conover v. Wardell, 22 N.J. Eq. 492, 499 (E. & A. 1871); Gordon v. Schellhorn, 95 N.J. Eq. 563, 573-74 (Chan. 1924); Becker v. Kelsey, 9 N.J. Misc. 1265, 1269-70 (Sup. Ct. 1931); Van Name v. Federal Deposit Ins. Corp., 130 N.J. Eq. 443, 445 (Chan. 1941), aff'd, 132 N.J. Eq. 302 (E. & A. 1942); Amsterdam v. DePaul, 70 N.J. Super. 196 (App. Div. 1961). As the Court said in Becker v. Kelsey, supra:

> "As a rule, fraud and misrepreentation can exist only where a false statement has been made. An exception to the rule that a false statement must be made is recognized in case where, by reason of the confidential relation of the parties or other facts, the duty is imposed on one of the parties to the transaction to

> make full and complete disclosure to the other party of all the facts known to him which are material to the transaction. Where such duty exists, an omission to make such complete disclosure is classed as a form of fraud or misrepresentation." (at p. 1269-70). (Emphasis supplied).

Similarly, the Court in Van Name, supra, said:

> "Silence may be fraudulent. 'If either party to a transaction conceals some fact which is material, which is within his own knowledge, and which it is his duty to disclose, he is guilty of actual fraud.'" (at p. 445).

Defendants as shown below not only owed a duty to disclose, but they took active steps to conceal the fraudulent activities.

On the morning of September 27, 1962, the three officials from Superintendence reported to Bunge that: (1) the team of inspectors had been unable to inspect the designated tanks, (2) Lomuscio asked the inspectors to accept certain figures in lieu of the scheduled inspection, (3) Lomuscio threatened the inspectors with a gun, and (4) DeAngelis sought to bribe Lapanna with a $25,000 check. The next day, September 28, 1962, the five executives from Bunge met with DeAngelis who informed them that (5) the oil purportedly stored at Harbor Tank was missing and could not be accounted for. Defendants did not disclose these facts to

anyone.

1. Defendants Had A Duty To Disclose Their Knowledge Of Allied's And DeAngelis' Illegal Activities To State And Federal Officials

Defendants failure to disclose to the appropriate regulatory and law enforcement officials of New Jersey and the United States the activities of September 27 and 28, 1962, constituted a breach of their statutory duty.

New Jersey statutory law provides in pertinent part:

> "Any person having knowledge of the actual commission within the jurisdiction of ... any high misdemeanor, who conceals and does not, as soon as may be, disclose and make known the same to a judge, magistrate, prosecutor or police authority, is guilty of a misdemeanor." NJSA 2A: 97-2.

A similar duty exists under 18 U.S.C.A. §4 (1969), which provides that it is a crime for a person..

> "having knowledge of actual commission of a felony cognizable by a court of the United States ... [to] conceal ... [or] not as soon as possible make known the same to some judge or other person in civil or military authority under the United States."

DeAngelis pleaded guilty to the felonies of conspiracy to defraud and forgery arising out of the activities of

Allied.[6/] These acts and others not prosecuted[7/] were known to defendants at the time of the September 1962 Incident. Under both federal and state law, defendants had a duty to report. Yet not once did the defendants step forward and divulge the information which would have led to the discovery of the fraud long before Haupt ever had financial dealings with Allied.

The liability of Bunge to the Trustee is established by Brennan v. Midwestern United Life Insurance Co., 286 F. Supp. 702 (N.D. Inc. 1968), aff'd, 417 F.2d 147 (7th Cir. 1969), cert. denied, 397 U.S. 989 (1970), a case squarely on point. That case arose out of the fraudulent activities of Michael Dobich ("Dobich"), and his wholly-owned corporation, Dobich Securities Corporation. Dobich purchases stock of a life insurance company, Midwestern United Life Insurance

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6/ DeAngelis was convicted of violating Sections 371 and 2314 of Title 18 of the United States Code.

7/ E.g., DeAngelis' attempted bribe of Lapanna violated NJSA 2A: 170-88, the offense of corruption; Lomuscio's threatening of the offense surveyors violated NJSA 2A: 90-3, assault with a deadly weapon; and the issuing of false warehouse receipts violated NJSA 2A: 109-1(b) (forgery) and NJSA 2A: 11-1 (obtaining money by false pretenses).

Company ("MULIC"), on behalf of his customers, but he failed to deliver the stock certificates to them because he had pledged the certificates for his own purposes. As a result of customer complaints, MULIC knew of Dobich's activities. MULIC permitted the activities to continue by failing to report Dobich to either the Indiana Securities Commission or the Securities and Exchange Commission.

In a class action brought on behalf of the rightful owners of the converted stock, MULIC was found liable for violating the securities law. The Court held that MULIC, like the defendants here, had a duty to report its knowledge of the fraudulent activities of Dobich to the appropriate regulatory body although it did not participate in them.

> "Had such a letter from MULIC to the Indiana Securities Commission been written in the week following November 23, 1964, the Commission would have taken administrative action resulting in termination or significant curtailment of Dobich's fraudulent activities. The process would not, of course, have been instantaneous. The Indiana Securities Commissioner, Martin K. Edwards, testified that a normal time period before a hearing once the Commission decided to hold a hearing was about 15 days.

* * *

> This court cannot determine with certainty the course that such a hearing might have taken or the action which would have resulted from such a hearing. If the Commission had examined the books or records of Dobich Securities Corporation which were then available, as the Commission clearly had the power to do, Dobich's license would have been suspended immediately. It is also possible that the warnings and publicity alone resulting from such a hearing might have forced Dobich to curtail his activities.
>
> * * *
>
> It is sufficient to observe that a letter from MULIC to the Indiana Securities Commission sometime in the week following November 23, 1964, relating a complaint or complaints of slow delivery or nondelivery by Dobich would have resulted in administrative action by the Commission culminating in a termination or significant curtailment of Dobich's fraudulent conduct no later than December 21, 1964.
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> * * *
>
> If in early December 1964 MULIC had revealed what it knew about Dobich to the United States Securities and Exchange Commission, an investigation would have immediately resulted and within two weeks after the start of such an investigation, Dobich's fraudulent activities would have been terminated." 286 F. Supp. at 427-428.

In Brennan, MULIC's liability was couched on conduct far less heinous than defendants' in the instant case.

MULIC's motive to conceal the fraudulent activities of Dobich from the authorities was not, as Bunge's was, premised on protecting its financial position at the expense of others. MULIC merely allowed Dobich's scheme to go unreported. Here, the defendants not only remained silent, but actively concealed the fraud.

On appeal, the Seventh Circuit affirmed the District Court's finding by referring to the record and by relying on a well-settled presumption.

> "Further support for the finding that the Indiana Commission would have acted if Midwestern had reported Dobich's misconduct is found in the presumption that public officials property discharge their official duties." 417 F.2d at 154

There can be no doubt, as the Trustee will demonstrate at trial, that had Bunge and its executives reported the fraudulent activities to any law enforcement agency or commission that an investigation would have resulted in Allied being placed in immediate insolvency proceedings and Haupt would not have conducted any business with Allied. Moreover, the presumption relied on by the Seventh Circuit is the law of New Jersey as well as the law of Indiana. See Bamburgh v. Board of Review, 48 N.J. Super. 472 (App. Div. 1958); In re Schlemm's Estate, 130 N.J. Eq. 295 (Perog. 1941).

2. Klein Had A Duty To Disclose His Knowledge Of Allied's And DeAngelis' Activities To The New York Produce Exchange

Klein, in addition to his statutory duty to disclose, as a member of the Board of Managers of the New York Produce Exchange, had a duty to disclose his knowledge of Allied's activities to that exchange. It is evident that if Klein had informed the New York Produce Exchange ("N.Y.P.E."), it too would have carried out its duties and investigated Allied and DeAngelis. As a manager on the N.Y.P.E. Board of Managers ("Board"), Klein owed a fiduciary duty of honesty, good faith and diligence to the N.Y.P.E. and its members, one of which was Haupt. His failure to disclose information vital to that Board's function and purpose was a breach of that duty.

Klein's position on the Board is analogous to that of a director on any corporation's board of directors.

> "The function of the board of directors is to manage the business of the corporation; in order to do so it may exercise all necessary powers." 1 Hornstein, Corporation law and Practice, §431 at 525. (1959). (Emphasis supplied). See N.Y. Business Corporation Law §701 (McKinney 1963).

Likewise, the By-Laws of the N.Y.P.E. state:

> "The property, affairs, business and concerns of the Exchange shall be

> vested in and managed by [a] 'Board of Managers' ..." N.Y.P.E. By-Laws, Sec. 12. (Emphasis supplied.)
>
> "The Board of Managers shall have full power and authority to do all proper and needful things to carry out effectively the objects and purposes for which the Exchange was incorporated, and to do such other lawful, proper and needful things as in their judgment will tend to promote the usefulness of the Exchange and carry out the purposes of its incorporation." N.Y.P.E. By-Laws, Sec. 13. (Emphasis supplied.)

As the function and purpose of the Board of Managers is exactly the same as that of a Board of Directors, Klein, as a member of the Board is bound by the same law that binds any corporate director.

> "Directors are expected to act as body, but each individual has definite responsibilities. He is required to be honest and act in good faith; he is also expected to be diligent." 1 Hornstein §431 at 527.
>
> "With respect to the corporation and its shareholders, directors are treated as fiduciaries ....Although they are not 'trustees' in a technical sense ... this term by analogy summarizes their relationship and its concomitants (responsibility and accountability)." 1 Hornstein §432 at 528-9.

As the N.Y.P.E. is incorporated in the State of New York, New York law governs the relationship between it

and its directors (the Board of Managers). The case law of New York is replete with decisions stating that corporate directors and officers occupy a fiduciary or trustee relationship to the corporation and owe an active duty of faithful conduct. Blaustein v. Pan Am. Petroleum & Transport Co., 293 N.Y. 281, 57 N.E. 2d 705 (1944); People v. Marcas, 261 N.Y. 268, 185 N.E. 97 (1933); Shorell Laboratories, Inc. v. H. Allen Lightman, Inc., 24 A.D. 2d 856, 264 N.Y.S. 2d 400 (1st Dept. 1965). See, N.Y. Business Corporation Law §717 (McKinney 1963).

Just as each director on a corporation's board has the responsibility and obligation to carry out the objects of the corporation, so did Klein as a member of the Board have the responsibility and obligation to carry out the objects of the N.Y.P.E. Section 2 of the By-Laws of the N.Y.P.E. provides in pertinent part:

> "The objects of this Association [N.Y.P.E.] are to provide and regulate a suitable room of rooms for a Produce Exchange in the City of New York; to inculate just and equitable principles in trade and enforce observation of same among its members; to establish and maintain uniformity in commercial usages; to acquire, preserve and disseminate valuable business information, and to adjust controversies and misunderstandings between its members." (Emphasis supplied.)

Klein in his fiduciary capacity as a member of the Board was charged with an affirmative duty of carrying out the objects

of the N.Y.P.E. As the United States Supreme Court recently said in SEC v. Capital Gains Research Bureau, 375 U.S. 180, 194 (1963):

> "Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts' ..."

As a result of the September 1962 Incident, Klein had in his possession facts and information about Allied and DeAngelis which were vital to the Board's proper regulation and management of the N.Y.P.E. and its members. Thus, in his fiduciary capacity as a member of the Board, Klein had a duty to affirmatively disclose his knowledge of the fraudulent activities of Allied to the Board and to the N.Y.P.E. His failure to do so was a breach of his managerial duties and thus fraudulent concealment. He concealed information which prevented the Board from carrying out its objects. If this information had been communicated to the Board, the Board would have disseminated it to the business community and prevented the financial debacle which subsequently took place.

C. Defendants Aided And Abetted Allied's Fraudulent Scheme

Defendants rather than disclosing the true facts, chose instead to participate in the fraud by switching the fraudulent Harbor Tank warehouse receipts for bona fide

Amexco ones in order to protect Bunge's financial position. Defendants then affirmatively took steps to suppress and conceal the fraud and their participation by (1) instructing Salmonowitz and Superintendence to keep the matter quiet and (2) immediately cancelling the full field audit they had scheduled in order to prevent Superintendence from learning the full extent of the shortage of the oil at Bayonne. Defendants active suppression of Allied's fraudulent activities constitutes both a tort and crime. 8/

The Restatement of Torts provides in pertinent part:

> "For harm resulting to a third person from the tortious conduct of another, a person is liable if he
>
> * * *
>
> knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." §876 (1939) (at p. 435).

The conduct of defendants by their failure to disclose and

8/ In New Jersey under NJSA 2A: 97-1, it is a misdemeanor to compound a crime. Acceptance by Bunge from Allied of Amexco warehouse receipts for Harbor Tank warehouse receipts as the price for non-disclosure of DeAngelis' unlawful indictable acts would most probably make Bunge guilty of compounding a crime.

their subsequent cancellation of the survey and instructions to Salmonowitz to keep the incident quiet aided and abetted the tortious activities of DeAngelis and Allied.

The commentators to the Restatement stated:

> "Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious, it has the same effect upon the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act." (at pp. 436-37). (Emphasis supplied.)

The Restatement has been adopted as the law of New Jersey in situations where, as here, defendants with knowledge of the wrongdoings of others have participated in the wrongdoing.

In Judson v. Peoples Bank & Trust Co., 17 N.J. 67 (1954) and its companion case, Judson v. Peoples Bank & Trust Co., 25 N.J. 17 (1957), the Supreme Court twice found Bankers Commercial Corporation ("Bankers") liable for its encouragement of the fraudulent activities of a third person. The first appeal challenged the lower court's grant of summary judgment in favor of defendant Bankers. In Judson, plaintiff owned or controlled almost all of the stock of a closely held corporation. The remaining shares were owned

by an employee named Evans.

The corporation had borrowed substantial sums from defendant Peoples Bank. In order to protect its loan to the corporation, the defendant Peoples Bank through one of its officers, Smith, arranged a scheme by which plaintiff would fraudulently be induced to give up control of the corporation by selling its stock.

Bankers who had dealt with the corporation for years was approached by Smith and Evans for help in the venture. In a legitimate business deal, Bankers provided the necessary financing which resulted in Evans, not plaintiff, having control of the corporation which soon became bankrupt. Plaintiff sued Peoples Bank, Smith and Evans as well as Bankers. Plaintiff did not allege that Bankers participated in the fraud, but only that Bankers through its activities made possible the accomplishment of the fraudulent scheme. The Court reversed the lower court's grant of summary judgment for Bankers. Judge Brennan, speaking for the Court, said:

> "Plaintiffs concede that Bankers did not enter the picture until after Smith's fraudulent representations to Judson had resulted in the execution of the Rager options. The theory upon which

> plaintiffs would hold Bankers liable for the results of the fraud is that Bankers understandingly connected itself with the conspiracy of Smith and Evans to defraud the plaintiffs and made possible the accomplishment of the fraudulent scheme.
>
> This theory of tort liability is recognized in our cases. The gist of the action is not the conspiracy charged but the tort working damage to the plaintiffs. Those who are not parties to the fraudulent plan when it is concocted but who join in promoting its accomplishment are equally liable for the resulting damage, Den ex dem. Steward v. Johnson, 18 N.J.L. 87 (Sup. Ct. 1840); Landriani v. Lake Mohawk Country Club, 26 N.J. Super. 157, 97 A.2d 511 (App. Div. 1953); see also, Van Horn v. Van Horn, 56 N.J.L. 318, 28 A. 669 (E. & A. 1893); Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 175 A. 62, 99 A.L.R. 1 (E. & A. 1934)." (at pp. 82-83). (Emphasis supplied.)

After trial, Bankers was found liable to plaintiff and it appealed. Chief Justice Weintraub, quoting Section 876(b) of the Restatement of Torts, affirmed the lower court's finding:

> "A person is liable with another if he 'knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself * * *'" (at p. 29).

The scope of the common law doctrine of aiding and abetting has grown tremendously in the last few years,

particularly in the area of securites law violations. In the Brennan case, supra, MULIC violated §10 of the Securities and Exchange Act of 1934 because it had by its silence aided and abetted the original tortfeasor, Dobich, to continue his illicit activities.[9/] Prior to trial, MULIC moved to dismiss the complaint on the ground that plaintiff's allegation of aiding and abetting failed to state a claim upon which relief could be granted. In denying defendants' motion to dismiss, the Court held that §10 of the Securities and Exchange Act of 1934 was grounded on the common law as stated in Section 876 of the Restatement of Torts (the same common law relied on by the Court in Judson, supra), and that accordingly plaintiff's complaint stated a good cause of action. See Brennan v. Midwestern United Life Insurance Co., 259 F. Supp. 673, 680 (N.D. Ind. 1966), aff'd. 417 F.2d 147, 155 (7th Cir. 1969).

The doctrine of aiding and abetting, premised on the common law, has gained wide acceptance in the securities field. See e.g., SEC v. National Bankers Life Insurance Co., 334 F. Supp. 444, 456 (N.D. Tex. 1971); Carroll v. First National

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9/ See pages 31-34, supra.

Bank of Lincolnwood, 413 F.2d 353, 357 (7th Cir. 1969); Green v. Jonhop, Inc., 1972-1973 CCH Fed. Sec. Law Rptr. ¶93,940 (D. Ore. 1973). As recently as last month in Lanza v. Drexel & Co., 1972-73 CCH Fed. Sec. Law Rptr. ¶93,959 (2nd Cir. 1973), the Second Circuit sitting en banc reaffirmed the validity of this common law principle. (at 93,829).

After the September, 1962 Incident, defendants were well aware that DeAngelis' activities constituted fraud as well as other crimes. Rather than report Allied's activities to the appropriate regulatory and law enforcement bodies, defendants chose to conceal the fraud by ordering Superintendence to cease its field survey and instructing Salmonowitz to keep the matter quiet. Defendants also cancelled plans for a monthly audit of Allied, which had it been undertaken, would undoubtedly uncovered some, of not all, of Allied's and DeAngelis' fraudulent activities.

At the very least, DeAngelis, similar to Dobich in the Brennan case, supra, was encouraged to continue with his illicit activities by defendants' failure to disclose. But, here, unlike MULIC in the Brennan case, defendants did not just remain silent. They actively participated in the scheme by exchanging fraudulent Harbor Tank warehouse

receipts for bona fide Amexco warehouse receipts and by permanently halting all investigations into Allied's warehouse facilities and its books and records. Clearly, defendants joined in promoting the fraud and they are liable for the resulting damage.

Defendants should not be allowed to benefit from their malfeasance. As Judge Kilkenny recently said in Amsterdam v. DePaul, 70 N.J. Super. 196 (App. Div. 1961), in disallowing an action brought by the holder of a note who had knowledge of a fraud perpetrated on the maker:

> "'Nowhere in the law is there the right to benefit from the fraud of another when the fraud could not be perpetrated except for that silence."

D. Defendants In Order To Recover The Value Of The Fraudulent Receipts Intentionally Injured Haupt

Defendants' paramount interest after its discovery of Allied's fraud was not how best to protect the public from DeAngelis' machinations, but how best to protect its own financial interests regardless of the subsequent harm to others. Immediately after DeAngelis acknowledged that the oil was missing and could not be replaced, Klein and the other Bunge executives entered into an arrangement with DeAngelis whereby the fraudulent Harbor Tank warehouse receipts were exchanged for Amexco warehouse receipts without any regard to the effect of the fraud on others.

It was common knowledge in the trade that Allied was issuing warehouse receipts as collateral for loans and credit given by firms such as Haupt. Bunge was so advised by DeAngelis at meetings in 1962 and 1963 with officers of Bunge and by correspondence between Bunge and DeAngelis before and after the aforesaid meetings. In addition, as a result of the September 26 letter agreement, Bunge knew that Allied would have to continue to operate in its already unprofitable manner and therefore Bunge knew that Allied would continue its fraudulent activities in order to survive.[10/] Accordingly, defendants when told of the missing oil were aware that Allied would be forced to continue to issue fraudulent warehouse receipts to innocent persons, firms or corporations in order to meet its business commitments. One of those innocent firms which ultimately received fraudulent Harbor Tank warehouse receipts was Haupt.

New Jersey has long upheld the right to pursue one's business, calling, or occupation free from undue interference or molestation. Louis Kamm, Inc. v. Flink,

10/ The terms and effect of this agreement are set out more fully at pages 14-15, supra.

113 N.J.L. 582 (E. & A. 1934). That right has continued to be protected by the Courts of this state. See, Harris v. Perl, 41 N.J. 455 (1964); McCue v. Deppert, 21 N.J. Super. 591 (1952); Louis Schlesinger Co. v. Rice, 4 N.J. 169 (1950); Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244 (App. Div. 1957).

In the Flink case, supra, the complaint alleged that plaintiff, a real estate brokerage company, disclosed to defendant president of a building and loan association, the name and identity of a prospective purchaser of a property owned by the association, upon the express promise of defendant that the disclosure would be held in strict confidence. The defendant allegedly broke its promise and through another broker effected a sale of the property to the prospective purchaser whose name had been disclosed. The Court held such complaint was sufficient in law and not sham because of the alleged unjustifiable interference by defendant in plaintiff's pursuit of its business.

> "Any act or omission which unjustifiably disturbes or impedes the enjoyment of [that] right constitutes its wrongful invasion, and is properly treated as tortious." (at p. 596).

The Court went on to find "malice" on the part of the defendant where, as here, self-interest at the expense of others was involved:

> "Self-enrichment or fraternal interest, and not personal ill will, may well have been the motive; but it is malice nevertheless. While ill will toward a person is malice in its common acceptance or popular sense, in the technical legal sense it is the intentional doing of a wrongful act without justification or excuse." (at 588). (Citations omitted). (Emphasis supplied.)

Similarly, the Supreme Court in Louis Schlesinger Co. v. Rice, 4 N.J. 169 (1950) in reaffirming this definition said:

> "Malice in the legal sense is the intentional doing of a wrongful act without justification or excuse. And a 'wrongful' act is any act which in the ordinary course will infringe upon the rights of another to his damage ..." (at p. 176).

Defendants in an attempt to save themselves at the expense of Haupt and other innocent victims of Allied's fraudulent activities have maliciously injured Haupt by their conduct. Defendants' failure to disclose and their active concealment of Allied's and DeAngelis' fraudulent activities constitutes wrongful acts or omissions which infringed upon Haupt's right to conduct its business without undue interference and which led directly to Haupt's financial ruin. The Trustee submits that defendants must be held responsible for their tortious injury to Haupt's business.

E. Defendants Knew Or Should Have Known That As A Result Of Their Conduct Innocent Victims Would Be Damaged

Defendants as a result of its knowledge of Allied's activities, in particular Allied's continued use and operation of the Harbor Tank facilities, knew that other non-suspecting persons, firms or corporations would be dealing with Allied and would receive fraudulent Harbor Tank warehouse receipts. Defendants were well aware that Allied had been issuing Harbor Tank warehouse receipts and must have concluded based on the information it knew about Allied's financing with Haupt, that Haupt would be a recipient of those receipts. Yet defendants continued to maintain their silence because Allied had agreed to exchange the fraudulent receipts for bona fide ones.

Bunge knew that others were actively dealing with Allied. In particular, it was known to Bunge that Haupt was acting as Allied's broker. Between August 20, 1963 and November 12, 1963, Bunge issued checks to Haupt in connection with transactions involving Allied. The checks issued by Bunge to Haupt more than adequately provided Bunge with knowledge of Haupt's activities in financing Allied. In ad-

dition, Bunge knew about the ex-pit transactions[11/] between Haupt and Bunge or Merrill, Lynch, Pierce, Fenner & Smith Co., acting as agent for Bunge and Lowell Hoit & Co. acting as agent for Haupt.

It is clear from the New Jersey case law that (1) Haupt's interest was within the ambit of interests protected by the Courts, and (2) Bunge's non-disclosures and affirmative acts to conceal the fraud proximately caused Haupt's financial ruin.

In Seidel v. Greenberg, 108 N.J. Super. 248 (Law 1969), an action was brought which was based, as here, on several elements of traditional torts. In Seidel, plaintiff and defendants had been arrested for "arson to defraud insurance companies" and "conspiracy" for their participation in the destruction by fire of certain property. Defendants, who

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11/ Ex-pit transactions -- a futures transactions that takes place off the floor of the commodity exchange. Such a transaction may be used (1) to effect an exchange of futures contracts for a like quantity of the actual commodity; or (2) to transfer a futures position (without changing ownership of the positions) from one commodity broker to another. The price at which an ex-pit transaction is executed is arrived at by agreement between the parties rather than by the auction process which characterizes a transaction conducted on the floor of an exchange and must be in accordance with the rules of the exchange involved.

were in fact guilty, were at all times aware of plaintiff's innocence of the accused crimes, yet they never disclosed his innocence or endeavored to help him in any way. As a result, plaintiff was falsely convicted and suffered certain injuries and damages. Plaintiff brought suit against defendants on the theory that had defendants not performed their criminal acts and caused the fire to be set, he would not have been injured. The Court found that defendants' activities proximately caused plaintiff's injuries.

Causation, in fact, has been described by this Court as follows:

> "'Causation is a fact. It is matter of what has in fact occurred. A cause is a necessary antecedent in a very real and practical sense, the term embraces all things which have so far contributed to the result that without them it would not have occurred. It covers not only positive acts and active physical forces, but also pre-existing passive conditions which have played a material part in bringing about the event. <u>In particular, it covers the defendants' omissions as well as his acts</u>. The failure to extinguish a fire may be quite as important in causing the destruction of a building as setting it in the first place.'" (at p. 259). (Emphasis supplied.)

In the instant case, there can be no question that defendants' breach ultimately caused, as a matter of fact,

Haupt's bankruptcy. Disclosure by Bunge and its officers of Allied's fraudulent activities would have prevented others from dealing with Allied at some future time and thus being damaged. Defendants' acts and omissions proximately caused Haupt's losses.

Had the officials of Bunge not violated the law by compounding and concealing a crime; had they reported to the law enforcement authorities their knowledge of DeAngelis' fraudulent conduct; had they reported the attempted bribe of Lapanna; had they reported the September, 1962 Incident to the New York Product Exchange and had they not cancelled the Superintendence survey, then the absence of the oil at the tanks of Harbor Tank would have been discovered. Here the failure to disclose the fraudulent activities of Allied and DeAngelis was as harmful as the initial fraud. An investigation into Allied's activities would have resulted in the discovery of the fraud, thus, eliminating the possibility that firms, such as Haupt, would ever have taken fraudulent Harbor Tank warehouse receipts as security.

The Court in Seidel noted that when, as here, the existence of causation in fact has been established:

> "The problems of 'proximate cause' 'foreseeability' 'duty' 'intervening cause' and the like are presented. In the last analysis, they resolve themselves down to problems, not simply of factual causation, but rather of policy justice and fairness." (Emphasis supplied) (at p. 259).

In determining the concepts of duty, proximate cause and foreseeability the Court strongly emphasized that these concepts are more liberally defined where, as here, an intentional tort has been committed:

> "It is well settled that where the acts of a defendant constitute an intentional tort or reckless misconduct, as distinguished from mere negligence, the aggravated nature of his acts is a matter to be taken into account in determining whether there is a sufficient causal relation to plaintiff's harm to make the actor liable therefor. His intention to commit a wrongful act, the degree of his moral wrong in acting, and the seriousness of the harm which he intended are important factors in determining whether he is liable for resulting unintended harm. In applying concepts of 'foreseeability' and 'proximate cause' in such cases there is more extended liability and in a case involving such aggravated acts a fact finder may be permitted to find that the actor's conduct bears a sufficient causal relation to a plaintiff's harm so as to make him liable, although no such finding would be permissible if defendants' conduct were merely negligent." (Citations omitted). (Emphasis supplied.) (p. 262).

In light of those considerations defendants can-

not seriously argue that they are without liability. Defendants had access to information which had they chose to disclose could have saved hundreds of potential victims from financial ruin. They knew that others were actively dealing with and would continue to deal with Allied and DeAngelis. They knew that Allied was losing money on every transaction it had with Bunge. Yet they chose to keep this information to themselves in order to protect their own interests without regard to the duties imposed on them by state and federal law and by Klein's membership on the Board of the N.Y.P.E. Moreover, defendants disregarded the effect that their non-action and subsequent concealment would have on the interests of others, thus insuring the financial ruin of hundreds of innocent victims. As a matter of policy, justice and fairness, defendants should bear full responsibility of their self-serving conduct in this affair.

CONCLUSION

By reason of the above, it is submitted that defendants Bunge and Klein are liable to the Trustee in the

amount of $4,007,300 plus interest from October 25, 1963 which is compensation to the bankrupt estate of Haupt for the damages caused by defendants' intentional injury to Haupt and their fraudulent concealment and encouragement of Allied's and DeAngelis' fraudulent activities. The Trustee also submits the defendants' wanton misconduct renders them liable to the plaintiff for punitive damages in an amount to be fixed by the Jury together with any other relief this Court deems just.

Respectfully submitted,

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Marc Friedman
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Paterson, New Jersey
Attorneys for Plaintiff,
Charles Seligson, as Trustee
in Bankruptcy of Ira Haupt & Co.

Of Counsel:

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Stipulation Between the Parties

SUPERIOR COURT OF NEW JERSEY,
LAW DIVISION
ESSEX COUNTY, DOCKET NO. L-41821-67

CHARLES SELIGSON, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt,

Plaintiff,

-against-

BUNGE CORPORATION and WALTER CHARLES KLEIN,

Defendants.

STIPULATION

WHEREAS, on October 6, 1964, Charles Seligson was appointed as Trustee for the Estate of Ira Haupt & Co., a Limited Partnership, Bankrupt ("Haupt Estate"), in proceedings pending in the United States District Court for the Southern District of New York, No. 64 B 259 ("the Bankruptcy Court"), and thereafter he qualified and has since acted as such Trustee ("Haupt Trustee"); and

WHEREAS, on August of 1968, the Haupt Trustee commenced an action in the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-41821-67, against Bunge Corporation ("Bunge") and Walter Charles Klein ("Klein") to recover $4,007,300 plus interest (the "Harbor Tank action"); and

WHEREAS, Bunge and Klein have denied any liability to the Haupt Trustee and have asserted numerous and diverse defenses; and

WHEREAS, substantial time, effort and expense would be required to litigate fully and comprehensively all of the

sharply disputed issues of fact and law pertinent to the various claims and defenses presented by the pending action; and

WHEREAS, the parties hereto believe that a compromise and settlement, as hereinafter described, will be in the best interests of the Haupt Estate, its creditors, Bunge and Klein; and

WHEREAS, the Haupt Trustee has represented that the bank creditors of the bankrupt estate are in favor of the within compromise and settlement.

NOW, THEREFORE, it is hereby stipulated and agreed by and between the undersigned as follows:

1. Bunge shall pay to the Haupt Trustee, the sum of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) in full and complete settlement, discharge and satisfaction of Bunge and Klein of and from any and all claims or causes of action asserted by him against Bunge and Klein in the Harbor Tank action. This stipulation shall not release, settle, compromise, discharge or satisfy any rights or claims of the Haupt Trustee against persons other than the released parties and on the terms hereof.

2. This stipulation is subject to the approval of the Bankruptcy Court having jurisdiction over the Haupt Estate and shall not be effective until an order approving this stipulation and its acceptance and performance by the Haupt Trustee is no longer subject to review or appeal.

3. On the next business day following receipt by Dewey, Ballantine, Bushby, Palmer & Wood, counsel for Bunge and Klein, of written certification by Weil, Gotshal & Manges, counsel for the Haupt Trustee, that this stipulation has become effective

as provided in paragraph 2 hereof by reason of the entry of an order in the Bankruptcy Court approving this settlement, which order has become no longer subject to review or appeal, (a) the Haupt Trustee shall execute and deliver to Bunge and Klein a release in the form annexed hereto as Exhibit A; (b) upon receipt thereof the sum of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000) shall be paid by Bunge to the Haupt Trustee; and (c) the parties hereto will instruct their attorneys to execute and cause to be filed with the Clerk of this Court a stipulation of dismissal of this action with prejudice in the form annexed hereto as Exhibit B.

4. The parties hereto will use their best efforts to obtain the approval of the Bankruptcy Court, and the entry of the order referred to in Paragraph 2 hereof. All recitals and provisions hereof and all acts taken or statements made by any party to obtain such approval shall be deemed taken or made without prejudice to the respective contentions of the parties hereto, and no such recitals, provisions, acts or statements shall constitute or be claimed by any person to be an admission or concession by any of the parties hereto for any purpose whatsoever. In the event that an order disapproving this stipulation is entered by the Bankruptcy Court and is no longer subject to review or appeal or an order approving this stipulation is ultimately reversed on review or appeal, this stipulation shall have no further force or effect, and no person is to benefit hereby or have any rights hereunder, or shall use or refer to it or any act taken or statement made with respect to it or the obtaining of the approval or entry of the order referred to above.

5. The parties hereto shall take all appropriate steps to adjourn all proceedings in this action until the entry

of a final order by the Bankruptcy Court with respect to this proposed settlement.

Dated: New York, New York
November 23, 1973

Charles Seligson

CHARLES SELIGSON, As Trustee of The Estate of Ira Haupt & Co., a Limited Partnership, Bankrupt

BUNGE CORPORATION

By: W. Klein
President

W. Klein

WALTER C. KLEIN

Stipulation of Dismissal

SUPERIOR COURT OF NEW JERSEY,
LAW DIVISION
ESSEX COUNTY DOCKET NO. L-41821-67

CHARLES SELIGSON, As Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt, Plaintiff, -against- BUNGE CORPORATION and WALTER CHARLES KLEIN, Defendants.	STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties that the above-entitled action be, and the same hereby is, discontinued with prejudice and without costs to any party as against another. This Stipulation shall be filed without further notice with the Clerk of the Court, and an order may be entered hereon without notice.

Dated: Newark, New Jersey
1973

COLE, BERMAN & BELSKY
Attorneys for Plaintiff,
Charles Seligson as Trustee in
Bankruptcy of Ira Haupt & Co.

By: _____

LUM, BIUNNO & TOMPKINS
Attorneys for Defendants,
Bunge Corporation and
Walter Charles Klein

By: _____

Release

SUPERIOR COURT OF NEW JERSEY,
LAW DIVISION
ESSEX COUNTY DOCKET NO. L-41821-67

----------X

CHARLES SELIGSON, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt,

Plaintiff,

-against-

BUNGE CORPORATION and WALTER CHARLES KLEIN,

Defendants.

----------X

RELEASE

WHEREAS, a Stipulation of Compromise and Settlement was executed as of November 23, 1973 by and between Charles Seligson As Trustee for the Estate of Ira Haupt & Co., a Limited Partnership, Bankrupt ("the Haupt Trustee") and Bunge Corporation ("Bunge") and Charles Walter Klein ("Klein") pertaining to an action pending in the Superior Court of New Jersey, Law Division, Essex County, (No. L-41821-67) commenced by the Haupt Trustee against Bunge and Klein (the "Harbor Tank action").

NOW, THEREFORE, for good and valuable consideration:

1. The Haupt Trustee, for himself, his predecessors, successors and assigns, and for and on behalf of the bankrupt Estate of Ira Haupt & Co., does

hereby remise, release and discharge Bunge and its present and former subsidiaries, affiliates, officers, agents, employees, directors, and stockholders, and Klein, his heirs and executors, from any and all claims asserted by him in the Harbor Tank action.

2. This Release may not be changed orally.

Dated: New York, New York
January 3, 1974

/s/ Charles Seligson

Charles Seligson, As Trustee of
the Estate of Ira Haupt & Co.,
a Limited Partnership, Bankrupt

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 3rd day of January, 1974, before me personally came CHARLES SELIGSON, to me known, and known to be the individual described in, and who executed the foregoing instrument, and duly acknowledged to me that he executed the same.

Notary Public

MICHAEL R. STANTON
Notary Public, State of New York
No. 60-9154890
Qualified in Westchester County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES SELIGSON, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt, Plaintiff, - against - NEW YORK PRODUCE EXCHANGE; NEW YORK PRODUCE EXCHANGE CLEARING ASSOCIATION; DONALD V. MacDONALD; FAHNESTOCK & CO.; HARRY B. ANDERSON; MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED; WALTER C. KLEIN; BUNGE CORPORATION; HAROLD H. VOGEL; CONTINENTAL GRAIN COMPANY; SIDNEY FASHENA; I. USISKIN & CO.; CARL R. BERG; SOLOMON J. WEINSTEIN; and DAVID L. BOYER, Defendants.	66 Civ. 1016 (RLC)

MEMORANDUM IN SUPPORT OF MOTION BY DEFENDANTS BUNGE CORPORATION AND WALTER C. KLEIN WITH RESPECT TO CERTAIN EVIDENCE

Of Counsel:

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NEW YORK 10005
212 DIGBY 4-8000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES SELIGSON, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt, Plaintiff, -against- NEW YORK PRODUCE EXCHANGE; NEW YORK PRODUCE EXCHANGE CLEARING ASSOCIATION; DONALD V. MacDONALD; FAHNESTOCK & CO.; HARRY B. ANDERSON; MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED; WALTER C. KLEIN; BUNGE CORPORATION; HAROLD H. VOGEL; CONTINENTAL GRAIN COMPANY; SIDNEY FASHENA; I. USISKIN & CO.; CARL R. BERG; SOLOMON J. WEINSTEIN; and DAVID L. BOYER, Defendants.	66 Civ. 1016 (RLC)

MEMORANDUM IN SUPPORT OF MOTION BY DEFENDANTS BUNGE CORPORATION AND WALTER C, KLEIN WITH RESPECT TO CERTAIN EVIDENCE

Defendants Bunge Corporation ("Bunge") and Walter C. Klein ("Klein") submit this memorandum in support of their motion, pursuant to Rule 403 of the Federal Rules of Evidence, to exclude evidence in any form concerning a September 1962 occurrence ("the Harbor Tank incident"). These defendants also request an interdiction barring counsel from referring to the Harbor Tank incident in the presence of the jury, either in counsel's opening or at any other time.

The Harbor Tank incident was the subject of a separate litigation brought by plaintiff Seligson against these defendants in the New Jersey State Court (the "Harbor Tank action"). In seeking permission to institute that action, Seligson represented to the Bankruptcy Court that the Harbor Tank action was based on claims "entirely separate and distinct" from the claims in this action.

This memorandum will show the evidence in question must be excluded pursuant to Rule 403, because it is not relevant to the claims involved in this litigation or, if relevant, its marginal relevance is strongly outweighed by undue prejudice to the defendants, further confusion of the issues, undue delay in the trial, and a needless waste of judicial energies.

In addition, defendants will establish as a separate and independent basis for exclusion that admission of the evidence would effectively permit plaintiff to relitigate the issues which were the subject of the Harbor Tank action in violation of the principles of res judicata, compounding further the prejudice to Bunge and Klein.

Lastly, defendants will show that if the claims involved in the Harbor Tank action were not "entirely separate and distinct", then the Complaint must be dismissed as to them because plaintiff has improperly split a cause of action.

STATEMENT OF FACTS

The evidence which plaintiff seeks to introduce and which this motion seeks to preclude is intended to establish plaintiff's version of the facts relating to the Harbor Tank incident.* That incident was the subject of the Harbor Tank action, a litigation commenced in New Jersey state court by plaintiff Seligson against the moving defendants. The trial judge in the Harbor Tank action estimated that the trial of that matter would take approximately four weeks. [Tr. of Pre Trial Cnf. at 21.]

On December 10, 1973, after a settlement agreement had been reached among the parties, plaintiff Seligson applied to Bankruptcy Judge Ryan for an order authorizing the settlement of the Harbor Tank action. As a result of this application, Judge Ryan entered an order, dated December 21, 1973, authorizing and approving the settlement of the Harbor Tank action. Pursuant to that settlement, plaintiff, as trustee of the Haupt bankruptcy estate, received $750,000 "in full and complete settlement, discharge, and satisfaction of Bunge and Klein of and from any and all claims or causes of action asserted by [Seligson] against Bunge and Klein in the Harbor Tank action." General releases were duly executed and de-

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* The contentions of plaintiff and defendants, as outlined in their trial briefs in the Harbor Tank action, are annexed hereto as appendices Nos. 1 and 2. While the Complaint and other documents in that and other actions are matters of public records, copies will be submitted to the court if needed.

livered to Bunge and Klein and the action was dismissed with prejudice.

Even though plaintiff has conceded that the Harbor Tank action was:

> ". . . based upon claims entirely separate and distinct from the claims asserted on behalf of applicant [Seligson] in the action pending in the United States District Court for the Southern District of New York entitled Seligson v. New York Produce Exchange, et al., 66 Civ. 1016, in which action Bunge Corporation and Walter C. Klein are named defendants." [Trustee's Application for authority to commence an Action, June 28, 1968, at 5-6, emphasis supplied.]

counsel for plaintiff has advised counsel for the moving defendants that they intend to relitigate the Harbor Tank incident in the trial of this case.

ARGUMENT

POINT I

Evidence of Harbor Tank Should Be Excluded on Grounds of Prejudice, Confusion and Delay

Rule 403 of the Federal Rules of Evidence provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighted by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Pursuant to this provision, evidence of unquestionable relevance may be excluded to avoid risks of unfair prejudice, confusion or undue delay. The Advisory Committee observed in its Notes explaining the Rule:

> "The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission."

Therefore, even if the Harbor Tank incident were determined to have some probative value on some issue involved in this case, Rule 403 calls upon the Court to consider that probative value and to weigh it against the potential for undue prejudice to defendants, the burdens imposed on the Court, and the prospects for undue delay and confusion of the jury.

A. The Probative Value of the Evidence. It appears from an analysis of plaintiff's complaint that the proposed evidence bears no relation to any of the elements of plaintiff's prima facie case on his first cause of action. To establish that claim, plaintiff must show a breach by defendants, either by an abuse of their discretion or bad faith regulation, of a duty owed to plaintiff, which breach was the proximate cause of injury to plaintiff. Cf. Deaktor v. L.D. Schreiber & Co., 479 F.2d 529, 534 (7th Cir. 1973); Goodman v. Hentz & Co., 265 F. Supp. 440, 447 (N.D. Ill. 1967); Seligson v. New York Produce Exchange, 378 F. Supp. 1076 (S.D.N.Y. 1974).

This position is fully supported by plaintiff's representation, which constitutes a judicial admission, that

the claims asserted in this action are "entirely separate and distinct" from claims pr[illegible]ised on the Harbor Tank incident.

There appear to be only two possible issues to which the proffered evidence could relate. One is Mr. DeAngelis' business reputation. (See plaintiff's "Bases For Claimed Liability," Pretrial Order, Schedule B, item (o).) There is plenty of other evidence concerning Mr. DeAngelis' business reputation (see p. 13, infra). The only other issue on which such evidence might be probative is the issue of foreseeability raised as a result of defendants' contention that Haupt's acceptance of forged warehouse receipts was an intervening cause of Haupt's injury. But, even if defendants could have foreseen that warehouse receipts would be forged, plaintiff must prove first that defendants knew Haupt was taking warehouse receipts and the evidence will establish that defendants did not know that. Only if plaintiff can establish that defendants knew that Haupt was taking warehouse receipts, does evidence of the Harbor Tank incident become even marginally relevant of the issue of foreseeability.

B. Undue Prejudice, Confusion and Delay.

1. Undue Prejudice. This is a complex case which requests a lay jury to determine, in practical effect, what should have been the proper regulatory policies of a commodities exchange. Charges that a brige was given, and that a convicted swindler and confidence man over a year prior to public disclosure "confessed" to Bunge of Allied's misrepresenta-

tions are easy to comprehend and undoubtedly would divert the attention of the jury from the real issues. Such evidence will, of course, be highly inflammatory not only with respect to defendants Bunge and Klein, but with regard to all of the co-defendants in this case.

As stated by the court in United States v. Chas. Pfizer & Co., 426 F.2d 32 (2d Cir. 1970), aff'd, 404 U.S. 548 (1972), the jury should not enter "upon its deliberations with its attention diverted from the real issues to . . . inflammatory issues." The considerations underlying the rule are well stated by Professor McCormick, who lays down "several counterbalancing factors which may move the court to exclude relevant circumstantial evidence if they outweight its probative value." The first two "in order of their importance" are particularly applicable here:

> "First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues." [McCormick on Evidence 319 (1954).]

The policy of excluding evidence of little probative value but substantial prejudicial effect has been applied in antitrust cases among others. For example, in Herman Schwabe, Inc. v. United Shoe Mach. Corp., 207 F.2d 906, 912 (2d Cir., cert. denied, 369 U.S. 865 (1962), the court upheld the trial judge's exclusion of evidence purporting to show the effect

of the defendant's alleged monopolistic activities upon the profitability of plaintiff's business, saying:

> "[I]t is the jury system itself that requires the common law 'judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning . . . to exclude matter which does not rise to a clearly sufficient degree of value'; 'something more than a minimum of probative value' is required. 1 Wigmore, Evidence (3rd ed. 1940), pp. 409-410. These comments are especially pertinent to an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it."

Another example is contained in International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449, 459 (1st Cir.), cert. denied, 375 U.S. 820 (1963), where the court excluded such evidence, saying:

> "Where the prejudice quotient is high, this fact will frequently render inadmissible evidence which - from a purely logical standpoint - may have a significant probative thrust . . . .'[I]f certain evidential material having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect an unfair prejudice to the opponent, . . . there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose.'"

For other applications of this rule see, Hartman v. United States, 215 F.2d 386, 391, 394 (8th Cir. 1954); Frank v. United States, 262 F.2d 695, 696-97 (D.C. Cir. 1958).

Admission of evidence concerning the Harbor Tank incident would leave open the danger that the jury here will subordinate the real issues to minor issues of only peripheral relevance. Courts and commentators have consistently viewed the admission of evidence likely to be prejudicial because

of its inflammatory nature with extreme caution. See Loew's Inc. v. Cole, 185 F.2d 641, 661 (9th Cir. 1950). Such a reluctance is consistent with the desire to secure a fair trial to all parties.

No limiting instruction could remove the taint which evidence of conspiracy, bribery and fraud would have on the jury's fact-finding. As Justice Cardozo cautioned in Shepard v. United States, 290 U.S. 96, 104 (1933);

> "It will not to do say that the jury might accept the declarations for [the limited purposes set forth in the Judge's instructions] discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are named. They have their source very often in considerations of administrative convenience, of practical expediency and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

As Judge Weinstein's treatise has summarized:

> "Courts are also reluctant to admit evidence which is seemingly plausible, persuasive, conclusive and significant if detailed rebuttal evidence or complicated judicial instructions would be required...." [Weinstein-Berger, Weinstein's Evidence, ¶ 403 [04] at 403-25 (1975).]

In the light of the broad sweep of plaintiff's allegations, the dubious source from which they arise, and their peripheral relevance, the inflammatory aspects of this evidence compel that it be excluded from the trial fo this case.

2. Evidence of The Harbor Tank Incident Would Confuse the Jury and Needlessly Prolong the Trial of This Case. The evidence which plaintiff would offer on the Harbor Tank incident, by his own admission, ". . . presents numerous unresolved issues of law and fact . . . . The defenses interposed by Bunge and Klein have been and will continue to be vigorously presented . . . ." [Seligson Application for Approval of the Settlement of the Harbor Tank Action, ¶ 20.]

A host of collateral issues will be raised by such evidence, full exploration of which will require an unreasonable amount of trial time and will inevitably confuse the issues in the minds of the jury. The applicable rule in such circumstances is outlined by Dean Wigmore in his treatise on evidence:

> "If the use of certain evidential material tends to produce undue confusion in the minds of the tribunal--i.e., the jurors--by diverting their attention from the real issue and fixing it upon a trivial or minor matter, or by making the controversy so intricate that the the disentanglement of it becomes difficult, the evidence tends to the suppression of the truth and not to its discovery; and there is good ground for excluding such evidence . . . ." [6 Wigmore on Evidence, § 1864 (at 490-91) 1940

This formulation has long been the accepted rule of evidence in the federal courts. E.g., N.E. Trust Co. v. Farr, 57 F.2d 103, 110 (1st Cir. 1932) and Golden Reward Min. Co. v. Buxton Min. Co., 97 F. 413, 416 (8th Cir. 1899). Rule 403 merely codifies this long accepted doctrine. See, Olin-Mathieson Chem. Corp. v. Allis-Chalmers Mfg. Co. 438 F.2d 833, 838-39 (6th Cir. 1971).

The Olin-Mathieson opinion, supra, is precisely on point. In that case, plaintiff sought to introduce evidence relating to an incident which took place five months prior to the property damage involved in the litigation. Noting that the jury already had been "subjected to a highly complex and technical set of facts," the Sixth Circuit Court of Appeals affirmed the trial judge's refusal to admit evidence relating to the prior incident, holding:

> "We conclude, therefore, that if the District Court judge had permitted evidence of the November incident, the jury would have presented with a multitude of collateral issues. A great deal more technical evidence would have become relevant, prolonging the trial unnecessarily and creating high probability of confusion of the issues . . . . We believe that any possible benefit was outweighed by the considerations of the undue prolongation of the trial and confusion of issues which would have accompanied receipt of this evidence." [438 F.2d at 837-38.]

The federal courts have frequently excluded evidence relating to prior litigations between the parties then before the court on the ground that such proof tends to confound the jury. Hence, in United States v. Costello, 221 F.2d 668, 674 (2d Cir. 1955), aff'd, 350 U.S. 359 (1956), the Second Circuit affirmed a trial judge's refusal to permit introduction of evidence relating to prior judgments assessed by the Internal Revenue Service against the defendant. Although these controversies "could, indeed, have been one link in a chain of reasoning" which might have exonerated the defendant [221 F.2d at 674], Judge Learned Hand concluded for the court that:

> "It is hornbook law that, although a party may offer evidence rationally relevant to the issue, that does not inevitably make it admissible. It may, as in this instance, tend rather to mislead than to enlighten the jury." [Id.]

Similarly, the court in the United States v. Johnson, 284 F. Supp. 273, 284 (W.D. Mo. 1968), refused to permit defendant to question various witnesses regarding the intent and potential biases of the government in bringing the criminal prosecution in question. In particular, defendants' counsel sought to inquire into matters regarding a prior civil action between the parties. The court would not permit the introduction of such evidence, holding:

> "Such a purpose would have been completely improper and would have resulted in confusing the jury and prejudicing the government which is also entitled to a fair trial." [284 F. Supp. at 284.]

3. Delay. Wholly independent of the prejudice and confusion which the Harbor Tank incident would engender, introduction of the full array of evidence relating to those events and Bunge and Klein's defenses thereto would take weeks of trial. It is settled law that a trial judge has discretion to exclude evidence which is only slightly probative if it would unnecessarily delay the trial. United States v. Bowe, 360 F.2d 1, 15 (2d Cir. 1966); United States v. Costello, supra; United States v. Grayson, 166 F.2d 863, 867 (2d Cir. 1948). See also, 2 Wigmore on Evidence §§ 443-44 (at 427-31) (1940); McCormick on Evidence § 152 (at 319-20) (1954). This is especially so where the offered proof is merely cumulative to facts already in the record. United States v. Bowe, supra.

In this case, the Court already has written an extensive opinion surveying various undisputed facts and admissions

in the record. In that opinion, the Court noted in the record a plethora of "facts or assertions of facts from which another motivation [for defendants' alleged misconduct] --viz., concern about whether DeAngelis was, in general, trustworthy-- might genuinely be inferred." 378 F. Supp. at 1096. In particular, these were:

> "[D]uring 1963, MacDonald had heard that a DeAngelis company had gone into receivership while facing SEC charges and that subsequently DeAngelis paid off his debts; DeAngelis had paid certain penalties to the federal government in connection with an export shipment; DeAngelis had been in 'trouble' with the government in connection with 'packaging' products for the federal school lunch programs; he had been charged with federal income tax evasion and a tax lien had been entered against him; Shearson, Hammill & Co. had refused to do business with him; and, that DeAngelis had been suspended from the Chicago Board of Trade in early 1963 for engaging in a wash sale . . . . Prior to the meeting with Stevens, Berg had heard that one of DeAngelis' companies had gone through a reorganization; DeAngelis wound up with a debit balance in some futures transactions which he paid personally; there were a number of persons who wouldn't do business with De Angelis but subsequently 'he had cleared up all the debts' and 'everybody in the business was doing business with him and . . . he was becoming an increasingly large trader in the fats and oils business.'" [Id., citations omitted.]

Hence, on any reasonable balance, the tenuous connection between the Harbor Tank incident and the events complained of in this action is far outweighed by the potential for confusing the jury in a case which by its nature is already complicated, and by the needless prolongation of the trial that its introduction would insure.

POINT II

Admission of Evidence Concerning Harbor Tank Would Violate Principles of Res Judicata

Plaintiff's attempt to introduce evidence relating to Harbor Tank violates the fundamental principles underlying the rule of res judicata. The Harbor Tank action was predicated upon evidence relating to the Harbor Tank incident. That action was terminated with prejudice after settlement. Plaintiff now seeks to relitigate exactly the same factual contentions in this Court.

Although each litigant must be given an opportunity to have violations of his rights adjudicated, well established public policy mandates that legal controversies. once resolved on the merits by a court of competent jurisdiction, must come to an end. Reed v. Allen, 286 U.S. 191, 198-99 (1932); Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 320 (1927); Stark v. Starr, 94 U.S. 477, 485 (1876). As the Fifth Circuit recently held in Stevenson v. International Paper Co., 516 F.2d 103, 109 (5th Cir. 1975):

> "Res judicata is a principle of peace. Under its influence, an end is put to controversies. Parties and their privies are made to abide definitive and final judgments and litigations are concluded.
>
> "Res judicata rests on a rule of public policy designed to put an end to mere contentious litigations. Under that rule, an issue once finally settled by the judgment of a court of competent jurisdiction remains settled. 'Public policy dictates that there

> be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and, that matters once tried shall be considered forever settled as between the parties.'" [516 F.2d at 109.]

To ignore this principle of finality when a plaintiff alleges "an expansion of facts" concerning a previously resolved matter, in the words of the Ninth Circuit, "would soon lead to chaos." Lester v. National Broadcasting Co., 217 F.2d 399, 400 (9th Cir. 1954). cert. denied, 348 U.S. 954 (1955). In fact, in rejecting a second attempt by a plaintiff to litigate a matter already terminated by his own actions, the Supreme Court made the value judgment that "the mischief which would follow the establishment of a precedent . . . disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship." Reed, supra, 286 U.S. at 199.

To this end, the Full Faith and Credit Clause of the United States Constitution, Art. IV, §1, 28 U.S.C. §1738 (1970), requires this Court to give dispositive weight to any final determination of a controversy by a state court. Fauntleroy v. Lum, 210 U.S. 230, 236 (1908); Reiter v. Universal Marion Corporation, 299 F.2d 449, 452 (D.C. Cir. 1962); Boothe v. Baker Industries, Inc., 262 F. Supp. 168, 173 (D. Del. 1966).

This policy of finality forecloses attempts to readjudicate matters which could or might have been presented in the previously resolved proceedings, as well as the relitigation of issues or legal theories directly complained of in the prior litigation. E.g., Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Angel v. Bullington, 330 U.S. 183, 192-93 (1947); Heiser v. Woodruff, 327 U.S. 726, 735 (1946); Buchanan v. General Motors Corp., 158 F.2d 728, 730 (2d Cir. 1947). As the Supreme Court explained in Angel, supra, while barring a litigant from federal court on the ground that he had previously adjudicated the same factual matter in the North Carolina state courts:

> "The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. And it has gone through, if issues that were or could have been dealt with in an earlier litigation are raised anew between the same parties." [330 U.S. at 193, citations omitted, and emphasis supplied.]

As a further example, the Fifth Circuit Court of Appeals in Norman Tobacco & Candy Co. v. Gillette Safety Razor Co. 295 F.2d 362, 363-64 (5th Cir. 1961) barred plaintiff from prosecuting an action under Section One of the Sherman Act on the ground that he had previously litigated essentially the same factual matter on a breach of contract theory brought under the common law of Alabama. As the court stated:

> "It is settled . . . that a litigant may not split his claim and have two trials on the same alleged breach of duty. Basically, Norman claimed the same 'right' in both suits -- the right to purchase Gillette products . . . . [In the first suit], appellant relied upon the breach of Gillette's supposed contractual relationship as the basis of its claim. Here, appellant relies on the breach of the antitrust laws as the basis of the alleged breach. But there was one breach and one only and appellant has had its day in court . . . . It cannot litigate this same breach again. The mere fact that, in the case already decided, Gillette's refusal to sell was alleged to have been wrongful for one reason and, in the present case, for another reason does not alter the fact that the cause of action was for the same injury. Appellant cannot get away from the fact that there has been a violation of one right by a single legal wrong." [295 F.2d at 363-64, citations omitted.]

The above principles apply with full force to the instant motion. Almost two full years ago, Seligson stipulated to a dismissal with prejudice of all claims arising out of the Harbor Tank incident. In return, defendants Bunge and Klein paid plaintiff three-quarters of a million dollars forever to lay to rest legal liability, if any, which they may have had in this regard. Of course, the dismissal with prejudice on the Harbor Tank action operates as a full adjudication on the mertis. Kelleher v. Lozzi, 7 N.J. 17, 80 A2d 196 (1951). See also, Mayflower Indus. v. Thor Corp., 17 N.J. Super. 505, 86 A.2d 293 (1952). This adjudication triggers the application of res judicata principles to any attempt to relitigate the issues thereby resolved. Lawlor v. National Screen Service, 349 U.S. 322, 324-25 (1955); Abramson v. Pennwood Investment Corp., 392 F.2d 759, 762 (2d Cir. 1968); Mars v. McDougal, 40 F.2d 247, 249 (10th Cir. 1930); Botsolas v. Schultz Laboratories, 351 F. Supp. 190 (C.D. Cal. 1972).

were fraudulent because no oil of the type and grade speci

In Boothe v. Baker Industries, supra, the District of Delaware dismissed an action brought there under the exclusive federal jurisdiction provisions of the Securities Exchange Act. A class action alleging New York State law violations arising out of the same corporate transactions complained of in that case, had already been settled by the defendants and "the complaint [was] dismissed . . . with prejudice . . ." 262 F. Supp. at 172. Noting the patent inequity to defendants in permitting a relitigation of the shareholder solicitation questioned in the first action, the court concluded:

> "Its [the settlement's] terms can only mean that the merger and proxy statement were intended to be protected from further attack . . . by . . . its stockholders regardless of the form of action in which the attack might be cast. It is inconceivable that Universal would have surrendered its right to receive $50,000 . . . unless . . . its stockholders were barred once and for all from relitigating the transactions which were the subject of the [prior] suit . . . .
>
> "There is no reason of public policy why a final judgment as was entered in the [prior] case should not bar further action by a stockholder attacking the same transaction . . . . Indeed, the desirability of ending litigation once and for all supports the view that the principle of res judicata . . . should be applied." [262 F. Supp. at 174-175.]

The court's statement in the Booth case applies here with even greater force as it is inconceivable that defendant would pay $750,000 in settlement of the Harbor Tank action unless Seligson "were barred once and for all" from relitigating the issues which were the subject of that action.

In view of the foregoing, Bunge and Klein would suffer obvious and substantial prejudice if this Court permitted the introduction of evidence relating to the Harbor Tank incident. The cases are legion which hold that a defendant suffers severe prejudice if he is denied the conclusiveness to litigation provided under the res judicata doctrine. E.g., Baltimore Steamship Co. v. Phillips, supra, 274 U.S. at 325; Thomas v. Consolidation Coal Co., 380 F.2d 69 (4th Cir. 1967); Hatchitt v. United States, supra, 158 F.2d at 757. The strength of the policies underlying res judicata and the extreme prejudice attendant with forcing defendants Bunge and Klein to relitigate matters previously terminated at substantial cost to them suffices to establish a claim of prejudice within the contemplation of Rule 403.

By precluding the introduction or any mention of evidence relating to the Harbor Tank incident, this Court, in practical effect, will prevent the "relitigation of those issues" within the meaning of an unbroken line of federal authority. E.g., Commissioner v. Sunnen, supra, 333 U.S. at 597; Toucey v. New York Life Insurance Co., 314 U.S. 118, 152-53 (Reed, J. dissenting on other grounds) (1941); Thomas v. Consolidation Coal Co., supra, 380 F.2d at 77; Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., supra, 295 F.2d at 364; Koblitz v. Baltimore and Ohio R.R. Co., 164 F. Supp. 367, 371 (S.D.N.Y. 1958) and Brickel v. Chicago, Burlington & Quincy R.R. Co., supra, 200 F. Supp. 240 (D. Wyo.

1961). Judge Weinstein has concluded in his recent exhaustive treatise on the Fhderal Rules of Evidence that Rule 403 applies with full force to the circumstances raised by the instant motion:

> "Courts are reluctant to becloud issues in the case at trial by admitting evidence relating to previous litigation involving the parties." [1 Weinstein's Evidence ¶ 403[04] (at 403-24) (1975).]

In sum, even conceding the relevance of the Harbor Tank incident to the matters at bar, Rule 403 offers this Court a clear mandate to reject plaintiff's offer of proof since, as clearly established, "its probative value is substantially outweighed by the danger of unfair prejudice.

POINT III

Unless the Claims in This Action Are Separate and Distinct from the Harbor Tank Action, Plaintiff Has Improperly Split a Cause of Action

If the claims in this action are not "entirely separate and distinct" from the claims in the Harbor Tank action, then plaintiff has improperly split a cause of action and the Complaint here must be dismissed as to Bunge and Klein. Plaintiff Seligson manifestly put in issue in the Harbor Tank action whether the Harbor Tank incident impacted on Klein's duties as a member of the Board of Managers of the New York Produce Exchange. Thus, plaintiff Seligson argued in his trial brief in the Harbor Tank action as follows:

2259

> "Klein, . . . as a member of the Board of Managers of the New York Produce Exchange, had a duty to disclose his knowledge of Allied's activities to that Exchange. It is evident that, if Klein had informed the New York Produce Exchange ('N.Y.P.E.'), it too would have carried out its duties and investigated Allied and DeAngelis . . . As a result of the September, 1962 incident, Klein had in his possession facts and information about Allied and DeAngelis which were vital to the Board's proper regulation and management of the N.Y.P.E. and its members . . . . If this information had been communicated to the Board, the Board would have disseminated it to the business community and prevented the financial debacle which subsequently took place." [Seligson Trial Brief at 35-38.]

In addition, Superior Court Judge Irving Kimmelman's pre-trial order indicated that the alleged dereliction of the duties imposed on Bunge and Klein by their membership on the Produce Exchange was fully at issue.* If plaintiff is now contending that duties arising out of the Harbor Tank incident are a part of his claim here, then he has improperly split a cause of action and Count 1 of the Complaint must be dismissed.

The same principles apply to Count 2 notwithstanding that no antitrust allegations actually were raised in the Harbor Tank action. That the Sherman Act reserves exclusive jurisdiction for prosecutions thereunder to the federal courts does not alter the applicability of res judicata to plaintiff's attempt to relitigate the anticompetitive aspects of the Harbor Tank incident.

If the factual subject matter of an exclusively federal cause was originally presented to a state court under a non-federal question theory, an attempt by a party to relitigate

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* Pre-Trial Order in Harbor Tank action.

the matter in a federal court under an exclusive grant of federal jurisdiction will be barred by the principle that all matters which could have been litigated in a prior action are forever resolved. Angel v. Bullington, supra, 330 U.S. at 191; Chicago, R.I. & P. Ry. v. Schendel, supra, 270 U.S. 611, 616 (1926); Dembitzer v. The First Republic Corp. of America, supra, CCH ¶ 91,566 at 95,142.

The holding in Connelly v. Balkwill, 174 F. Supp. 49 (N.D. Ohio 1959), is precisely apposite. There, an action had been commenced in the Ohio state court system which alleged misdealings in connection with the purchase and sale of securities. That action was dismissed with prejudice. A second action was brought under Section 10(b) of the Securities Exchange Act of 1934 and plaintiffs there resisted the imposition of a res judicata defense in part on the ground that it was "an action of which the federal courts have exclusive jurisdiction." 174 F. Supp. at 55. The court rejected plaintiffs' argument, holding:

> "Thus, while the courts of the several states have jurisdiction to determine actions based on fraud connected with the purchase or sale of securities, they have no jurisdiction in cases involving violations of Rule X 10b-5 which include the direct or indirect use of interstate facilities . . . . It does not follow, however, that an action in federal court under Rule X 10b-5 is necessarily a different cause of action than an action in the state court based upon the same facts." [174 F. Supp. at 56.]

that Bunge should have realized that Allied was operating at

Having concluded that the standards applied by Ohio's courts were similar to those followed by federal courts in construing the Securities Exchange Act, the court dismissed the subsequent action by concluding:

> "[I]t is held that this case is based upon a cause of action no different from the cause of action upon which plaintiffs sought recovery in the previous action and that the final judgment in that action constitutes a bar to the maintenance of this action against defendants . . . who were defendants in the state court action." [174 F. Supp. at 60.]

Accord, Kaufman v. Shoenberg, 154 F. Supp. 64 (D. Del. 1954) (dismissal by federal court of subsequent Securities Exchange Act claim on a showing that "the evidence necessary to enable plaintiff to prevail herein would have been sufficient to authorize a recovery by her in the state court" where she had previously prosecuted a factually similar action against the same defendant). In fact, Professor Moore's treatise has concluded that the Connelly and Kaufman decisions state the applicable federal law on the ground that:

> "If a plaintiff wishes to avail himself of the federal grounds supporting his cause of action, a federal forum is available to him in the first instance. And under the doctrine of 'pendent' jurisdiction, state as well as federal grounds will be available in support of a federal action." [1B Moore's Federal Practice ¶ 0.410[2] (at 1183, n.38) (1974).]

No federal regulatory policy would be frustrated by the application of res judicata to plaintiff's anticipated attempt to relitigate the Harbor Tank incident under the aegis of a Sherman Act violation. A frequently cited commentary on this topic has observed:

"As long as the purpose of the state-created right is essentially the same as the federally-created right, and as long as the elements necessary to establish the state and federal claims are equally strict, there is no reason for withholding bar or merger effect from a prior state court judgment on the ground that there are two distinct causes of action. On the contrary, the policies underlying res judicata demand according this effect to the state court judgment under these circumstances, when cutting into the concept of exclusive federal jurisdiction with the res judicata knife is not attended by any possibiilty of a substantial frustration of federal purpose or interest implicit in the federal claim." [Comment, Res Judicata, 53 Va. L. Rev. 1360, 1375-76 (1967).]

Unless, as Seligson has stated, the claims in the Harbor Tank action are "entirely separate and distinct" from the claims asserted here, the authorities discussed above clearly require that the claims in Counts I and II of his complaint here must be dismissed as to Bunge and Klein. If the claims asserted here are different, the Harbor Tank action is concluded and should not be relitigated before this Court.

Dated: September 15, 1975

Respectfully submitted,

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Of Counsel:

Hugh N. Fryer
Edward E. Blythe
David J. Goss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

CHARLES SELIGSON, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt,

Plaintiff,

- against -

NEW YORK PRODUCE EXCHANGE; NEW YORK PRODUCE EXCHANGE CLEARING ASSOCIATION; DONALD V. MacDONALD; FAHNESTOCK & CO.; HARRY B. ANDERSON; MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED; WALTER C. KLEIN; BUNGE CORPORATION; HAROLD H. VOGEL; CONTINENTAL GRAIN COMPANY; SIDNEY FASHENA; I. USISKIN & CO.; CARL R. BERG; SOLOMON J. WEINSTEIN; and DAVID L. BOYER,

Defendants.

- x

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APPENDICES TO MEMORANDUM

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APPENDIX 1

EXCERPTS FROM TRIAL BRIEF ON BEHALF OF SELIGSON IN SELIGSON V. BUNGE CORPORATION ET AL. (New Jersey Superior Court)

~~with a minimum total remuneration of $1 million in any case.~~ Finally, Allied agreed to permit Bunge to conduct a monthly audit and survey of all pledged merchandise and to provide Bunge with monthly reports showing information on its position in the cash and futures market, stocks of oils pledged to others, and other financial information.

No monthly audits were ever conducted and the only survey undertaken was cancelled by Bunge before completion. Bunge was aware of the cost of oil to Allied and the price on the sales of that oil by Allied. The Trustee will show that Bunge knew that Allied was losing money on every sale to Bunge because of the financing charges Allied was required to pay Bunge and others, and Bunge's insistance on a minimum ~~profit of $2 per ton.~~

2. The September 1962 Incident

On September 26, 1962, as part of the program whereby Bunge would be extending large scale financing to Allied, Bunge loaned $2,400,000 to Allied and received as security two Harbor Tank receipts. As a preliminary step, Fornari instructed Superintendence to make a complete

2266

survey of the Harbor Tank and Amexco oil tanks at Bayonne in which oil purportedly represented by the warehouse receipts held by Bunge was stored. On September 26, 1962, Fornari told DeAngelis that Bunge would conduct such a survey and that Superintendence would initially inspect two Harbor Tank tanks numbered 5084 and 5087 at Bayonne that supposedly held over 32,000,000 pounds of oil as described in the two aforesaid receipts.

That afternoon Daniel Byrne ("Byrne") and James Lapanna ("Lapanna"), two Superintendence surveyors, attempted to inspect the two tanks. At Bayonne, Byrne and Lapanna after some delay met with the Harbor Tank custodian, Joseph Lomuscio ("Lomuscio") and requested that he take them to the two tanks. Lomuscio declined and instead asked them to accept for the time being certain figures which he would furnish to them and return the next day to inspect the tanks. The surveyors refused to do this. Lomuscio then removed a gun from his desk and threatened the Superintendence surveyors with it.

The surveyors then went to the Allied office and demanded to see the tanks. Lapanna was ushered into the office of DeAngelis. DeAngelis said that there had been

a mixup in transferring oil to the two tanks; that the surveyors should accept Lomisco's figures, and that they could come back the next day to inspect the tanks. Lapanna objected to this procedure noting that Allied had not done any favors for Lapanna. DeAngelis then gave Lapanna a check for $25,000 drawn to Lapanna's order which Lapanna accepted. Thereafter Lapanna accepted the Harbor Tank computations and samplings and the Superintendence employees left.

That evening, Lapanna called William Boecking ("Boecking"), a Superintendence Vice President, and told him what had transpired at Bayonne that day. Boecking, in turn, informed Jules Salmonowitz ("Salmonowitz"), President of Superintendence. Klein, Forti and Fornari admitted in their deposition testimony that on the next morning, September 27th, Salmonowitz, Boecking and Lapanna appeared at the Bunge office and told Fornari in detail what had transpired on September 26, 1962 at Allied. Fornari thanked the Superintendence group for the information and said that Bunge would look into the situation. Fornari then dismissed the Superintendence group and then unsuccessfully attempted to stop payment on the $2,400,000 check which Bunge had delivered to Allied on September 26, 1962.

Fornari next phoned DeAngelis for an explanation of the incident. DeAngelis stated that there had been a mixup, that he could explain everything, and that the Bunge officials would be welcomed at Allied if they wanted to come to Bayonne to discuss the situation. Fornari reported these events to Klein and then Fornari, Forti, Groeneveld and Carpentieri (an employee in Bunge's traffic department) drove over to Bayonne to see DeAngelis.

The Bunge officials met with DeAngelis at the Allied office in Bayonne where DeAngelis explained that the reason that the two Superintendence surveyors had not been able to inspect the tanks described in the warehouse receipts delivered to Bunge on September 26, 1962, was that the tanks contained no oil because a mistake had been made. DeAngelis indicated that if Bunge was unhappy about the Harbor Tank operation that plenty of free oil existed in the Amexco warehouse. Fornari told DeAngelis that the Bunge group would like to satisfy themselves that free oil, in fact, existed at the Amexco warehouse. The four Bunge employees then walked over to the Amexco offices where Groeneveld and Forti looked over the shoulder of the Amexco custodian and glanced at some Amexco inventory sheets.

Fornari and Carpentieri then proceeded to the oil tanks and Fornari physically inspected the aforesaid tanks in order to satisfy himself that free oil did exist. At the same time, Forti and Groeneveld satisfied themselves from the Amexco records that there was more than enough oil in the Amexco tanks to cover the two Harbor Tank receipts in question from the previous day. The Bunge officers told DeAngelis that they wanted to have nothing to do with Harbor Tank warehouse receipts and that they wanted only Amexco warehouse receipts. Thereafter, the Bunge officers left the Bayonne facilities.

On the morning of September 28, 1972, as the Trustee will prove, Klein accompanied by Kenner, Fornari, Forti and Goreneveld, went to Allied to confront DeAngelis and demand a complete explanation of the incident with the two surveyors. DeAngelis advised the Bunge officials that Allied was short approximately $7 million worth of oil, that the posting of Allied's records was six months behind, and that the two tanks allegedly containing oil to collateralize the $2.4 million loan of September 26, 1972 from Bunge to Allied had in fact no oil. DeAngelis confessed that the Harbor Tank warehouse receipts purporting to represent oil

227.

were fraudulent because no oil of the type and grade specified in the receipts was in the tanks. The Bunge officials asked DeAngelis what he was going to do about getting Bunge out of its predicament. DeAngelis stated that there was one possible solution.

DeAngelis advised the Bunge officials that the warehouse receipts issued by Amexco were valid. He then agreed with the Bunge officials that if they would keep the entire incident quiet, he would arrange for the orderly switch of fraudulent Harbor Tank warehouse receipts then held by Bunge for bona fide Amexco warehouse receipts.

Pursuant to this understanding, DeAngelis (1) took back the Harbor Tank warehouse receipts held by Bunge as of September 28, 1962, and had replaced most of the Harbor Tank warehouse receipts previously held by Bunge with Amexco warehouse receipts as of October 5, 1962, and (2) paid to Bunge those obligations secured by the Harbor Tank warehouse receipts not exchanged for Amexco warehouse receipts.

As the Trustee will prove, upon learning of Allied's fraudulent activities, Bunge and Klein not only failed to

report and reveal the events which took place between September 26th and 28th, 1962, but actively suppressed and concealed the events:

(a) By wrongfully instructing Salmonowitz and Superintendence to keep the matter quiet when Salmonowitz returned to Klein's office for instructions on or about September 30, 1962.

(b) By immediately cancelling the full field audit it had scheduled of the oil held by Bunge as collateral so as to prevent Superintendence from learning of the full extent of the shortage of Allied's oil at Bayonne; and

(c) By wrongfully failing to disclose the facts to any law enforcement official of the United States, New Jersey, or other interested jurisdiction; the New York Produce Exchange; the management of Harbor Tank; persons, firms or corporations engaging in transactions with Allied involving Harbor Tank warehouse receipts, ultimately including Haupt and banks with which Haupt dealt; or any private organization invested by law with self-regulatory responsibilities.

Subsequent to September 27, 1962, Harbor Tank warehouse receipts covering commodities purportedly stored at Harbor Tank were returned to Allied by Bunge and as a

2272

direct result other fraudulent Harbor Tank warehouse receipts were issued by Allied and DeAngelis to unsuspecting firms dealing with Allied and DeAngelis, including Haupt, in exchange for monies and other valuable consideration.

~~3. Bunge's Activities After The September 1962~~
Incident

After learning the fraudulent nature of the Harbor Tank warehouse receipts, Bunge consummated its understanding with Allied by exchanging the Harbor Tank receipts for Amexco receipts. Bunge then took additional steps to insure that the Amexco receipts were genuine and that it had the necessary insurance covering to protect itself against financial losses due to missing oil. Thus, in a series of letters and memoranda in October and November, 1962, Bunge confirmed its insurance status. Then, for the first time in November, 1962 Bunge insisted on segregation of the oil financed by Bunge into specific tanks at Amexco without commingling with the oil of other persons engaged in financing Allied plus a certificate from Superintendence verifying the inventory represented by the Amexco warehouse receipts given as collateral to Bunge.

Bunge's concern with Allied and the Amexco warehouse receipts is reflected in two memoranda circulated among ~~the executives of Bunge. On March 21, 1963, Forti and~~

Amexco receipts, covering 105,000,000 pounds of oil, to Bunge.

APPENDIX 2

EXCERPTS FROM TRIAL BRIEF ON BEHALF OF BUNGE AND KLEIN IN SELIGSON V. BUNGE CORPORATION ET AL., (New Jersey Superior Court)

I.

STATEMENT OF FACTS*

A. The "Harbor Tank Incident"

The crucial factual question raised by the complaint relates to what was said at a conference between five officers of Bunge, Anthony DeAngelis (DeAngelis) and one Ben Rotello (Rotello), DeAngelis' chief lieutenant, held on September 28, 1962. The only possible basis for the charges against Bunge rests upon the testimony of DeAngelis and Rotello. Each has served a substantial jail sentence, having pleaded guilty to several counts of conspiracy, forgery and deliberate fraud arising out of the activities of Allied Crude Vegetable Oil Refining Corp. (Allied). Indeed, DeAngelis has pleaded guilty to a fraud directed specifically against Bunge.

The plaintiff indicates that DeAngelis will testify that, at the conference, he admitted he was short a very substantial amount of the oil necessary to back up outstanding field warehouse receipts and that Allied was many months behind in posting their records. He supposedly will state

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* Nothing in our review of the facts and allegations of the plaintiff has led us to the conclusion that anything substantially different from the facts related in our pretrial memorandum will be adduced at trial. Therefore, this statement of facts is substantially the same as Exhibit 3 to the pretial memorandum previously filed in this case.

that Bunge should have realized that Allied was operating at a deficit.

However, the testimony of Bunge's officers who were present will indicate that the facts were quite different. All of these individuals, including Walter C. Klein, President of Bunge, Harry D. Fornari, co-head of the Bunge Oil Department at that time, and Hamilton G. Kenner, then Secretary and in-house counsel, attended at least one of two meetings that took place in September 1962.* Their testimony contrasts sharply with that of the convicted felons, DeAngelis and Rotello. An examination of their testimony indicates that the true facts of those meetings were as follows.

1. Events Prior to September 27, 1962.

On September 26, 1962, as part of an arrangement under which Bunge was extending loans to Allied of approximately $12,000,000 for the new crop year, Bunge advanced the sum of 2.4 million dollars and received as collateral two receipts from Harbor Tank Warehousing Ltd. (Harbor Tank), covering 34.3 million pounds of crude degummed soybean oil located in two numbered tanks in Harbor Tank's field warehouse maintained at the Allied premises at Bayonne, New Jersey. At the time the loan was arranged, on the morning of September 26, DeAngelis

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* Karl Groeneveld, then Traffic Manager of the Oil Department, who also attended the meetings, has since died. Richard Forti, the other co-head of the Bunge Oil Department, has since retired, and is now living in Italy.

was advised that Bunge desired to have a survey made of the two tanks that afternoon and DeAngelis indicated agreement. Bunge instructed the Superintendence Company to make the survey.

2. September 27, 1962.

On the following morning, September 27, 1962, representatives of the Superintendence Company advised Mr. Fornari that the surveyors who had gone to Bayonne the previous day had not been allowed to survey the two tanks, and that they had been asked to come back the following day. Mr. Fornari was also informed that DeAngelis had given one of the surveyors his personal check for $25,000.* Mr. Fornari promptly telephoned DeAngelis and asked for an explanation. DeAngelis said that there had been a mix-up in connection with the movement of oil from one tank to the other, that his instructions for the oil to be put into the tanks had not been carried out, and that the whole matter was being corrected. Mr. Fornari then advised DeAngelis that Bunge personnel would come over to the Bayonne facilities for a full investigation of the matter.

In the early afternoon of that day, Messrs. Fornari and Forti, together with Messrs. Groeneveld and Carpentieri, a traffic clerk, went to Allied's premises in Bayonne. Messrs.

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* Plaintiff alleges that the Harbor Tank custodian threatened the surveyors with a dangerous weapon. That this ever occurred is doubtful; that any Bunge personnel were advised of any such threat is disputed.

Fornari and Forti spoke with DeAngelis and again asked for an explanation. DeAngelis repeated the explanation he had given on the telephone, indicating that there was sufficient oil to cover the receipts. When asked about the $25,000, DeAngelis said that he had intended nothing improper in giving it, and that he had only given it because the surveyor involved had been asking him for some time about making an investment in a motel venture, implying that there had been no attempt to conceal the mistake.

DeAngelis insisted that there was plenty of free oil in American Express Field Warehousing (Amexco) to cover the two Harbor Tank receipts. Messrs. Fornari and Forti suggested that they check this for themselves and DeAngelis readily agreed. Messrs. Fornari, Forti, Groeneveld and Carpentieri went to the offices of Amexco. There they spoke to Thomas P. McLarney (McLarney), the Amexco field warehouse custodian. Mr. Fornari received permission from McLarney to inspect the Amexco tanks for which Bunge held warehouse receipts, and left to do so with Mr. Carpentieri. Messrs. Forti and Groeneveld remained with McLarney to review the Amexco records.

Although McLarney would not permit a detailed inspection of his records, stating that he did not have authority to show them to third parties, he did read from the records and permitted Messrs. Forti and Groeneveld to look over his shoulder. Mr. Groeneveld noted that the Amexco records appeared to be very well kept and that they showed the correct

amount of oil held by Amexco for Bunge's account. McLarney said that any changes since the previous Friday would have to be obtained from Allied. A check with Allied indicated that the amount of crude degummed soybean oil held by Amexco that was not pledged to anyone was almost twice as much as the amount of oil represented by the two Harbor Tank receipts.

While this review of the Amexco records was being conducted, Mr. Fornari and Mr. Carpentieri conducted a physical inspection of various Amexco tanks. Mr. Fornari satisfied himself that each of them contained the type and quantity of oil covered by Bunge's warehouse receipts.

After these inspections were concluded, Messrs. Fornari and Forti again met with DeAngelis. They told him that they were satisfied that there was sufficient oil. However, in view of the fact that Harbor Tank would so cavalierly issue warehouse receipts when Allied had mistakenly failed to pump oil into the tanks, they indicated that Bunge wanted no more Harbor Tank receipts but only Amexco receipts. DeAngelis said this would take some planning to accomplish but that a schedule outlining when this might be done would be prepared. Another meeting was arranged for the following day.

3. September 28, 1962.

On the morning of September 28, 1962, when Messrs. Fornari, Forti and Groeneveld were about to leave the Bunge offices to see DeAngelis in Bayonne, Mr. Klein decided that he and Mr. Kenner should accompany them. Upon arriving at

Bayonne all were ushered into the conference room where DeAngelis, Rotello and (for a short time at the outset) Michael DeAngelis were present. During the meeting, DeAngelis reviewed the Allied problems resulting from the tremendous volume of oil that moved in and out of the Allied plant and the processing that had to take place. He noted the great number of rail cars and barges which were received daily, and that the merchandise they carried had to be unloaded and placed in storage tanks, either in one of the field warehouses (Amexco or Harbor Tank), or in Allied's own tanks. The oil then had to be withdrawn from those tanks and processed, either by refining, degumming, deodorizing, or other processes. In addition, the oil had to move from these tanks to drumming stations and finally to barges or ocean-going vessels. He said that all this was a large and difficult movement which required handling by a large number of people, the logistics of the entire operation were vast and difficult to manage, and that in all of this sometimes mistakes were made.

DeAngelis went on to say that he had given the order for the oil to be placed in the two Harbor Tank tanks and that somehow there had been a mix-up, and that the people delegated to do the job were late in doing it or had failed to do it. He pointed out that in any event, as Messrs. Fornari, Forti and Groeneveld had satisfied themselves on the previous day, there was adequate free Allied oil in Amexco to cover the two receipts. DeAngelis then berated Bunge for having too large

a margin of warehouse receipt security on its loans and asserted that this hampered his ability to conduct the entire operation. In view of all this, he said, no one could expect the Allied operation to be carried on without some slip-ups. He pointed out that in all Allied's dealings with Bunge, involving hundreds of contracts and many millions of dollars, Allied had always lived up to its obligations. DeAngelis concluded by saying that this particular incident was insignificant in connection with the over-all movement of goods involving vast amounts of money and material.

At this meeting Mr. Klein spoke on behalf of Bunge, telling DeAngelis that while the amount involved might not be large in relation to Allied's total volume, none the less Bunge viewed the incident very seriously. He stated that there was absolutely no excuse for the warehouseman to have issued the receipts when the tanks had not been filled by reason of a mistake, that there should not have been an attempt to conceal the mistake, and that Bunge wanted nothing more to do with Harbor Tank field warehouse receipts.

DeAngelis replied that he already fully understood Bunge's point of view and that Rotello had been up practically all night preparing a program under which the only field warehouse in which Bunge would hold receipts would be Amexco. That this could be done was not surprising, since over a week before, on September 20, Allied had indicated to Bunge that by the end of October all of the field warehousing at Bayonne would be done

by Amexco rather than by Harbor Tank. DeAngelis then presented a schedule which he said had been prepared by Rotello overnight outlining the program which was to be accomplished in one week.

DeAngelis and Rotello then left the room and the Bunge representatives discussed the matter among themselves. Their discussion dealt generally with the questions of whether or not the program proposed by Allied was satisfactory and, if so, whether Allied would carry it out. They concluded that the program was acceptable because on all prior occasions Allied had performed its obligations to Bunge's satisfaction. DeAngelis and Rotello returned to the room, and Mr. Klein advised them that Bunge would accept the program, making it quite clear that Bunge expected the program to be carried out as proposed. DeAngelis agreed, and the Bunge representatives, after a brief tour of an adjoining facility, left and returned to the Bunge offices in New York. Between September 28 and October 5 all of the Harbor Tank receipts held by Bunge were replaced with Amexco receipts.

4. The Allegations of DeAngelis and Rotello.

In an affidavit, made while he was still in prison, and apparently setting forth the substance of what plaintiff expects DeAngelis to testify to at trial, DeAngelis states

that the Harbor Tank warehouse receipts in question were prepared under his general direction, and admits that the tanks in question "did not contain any Allied commodity". He agrees with the testimony of the Bunge personnel that these receipts were intended to secure a loan of 2.4 million dollars and that pursuant to Bunge's orders, inspectors from Superintendence Company arrived to conduct a survey. He also admits that he attempted to dissuade the inspectors from performing their function and that he offered one of them, James Lapanna, a check for $25,000 to convince him that DeAngelis would back him in a proposed motel venture.

DeAngelis' flexible memory also adheres to the facts by recognizing that, on the day after the unsuccessful inspection, he received a telephone call from Mr. Fornari indicating perturbation at the attempts to prevent the previous day's inspection, and indicating the Bunge personnel wished to meet with DeAngelis later that day -- apparently September 27. From this point on, DeAngelis' hold upon reality becomes tenuous and unsupported by facts in his sworn statement.

DeAngelis indicates that there was only one meeting between himself and Bunge personnel and that this took place on the same day as the call he received from Mr. Fornari. Nowhere does he recall the inspection of the Amexco operations. Nowhere does he explain how, in light of the short notice that the one meeting he describes would allow, Rotello was able to prepare and have typed the definite schedule which Rotello admits, in an affidavit also relied upon by plaintiff, was

given to Mr. Groeneveld at the meeting with Messrs. Klein, Fornari, Kenner, Forti and Groeneveld.

While DeAngelis agrees in his affidavit that he told the Bunge officers that there had been a mix-up in pumping oil into the Harbor Tank facilities, he then proceeds to the incredible assertion that he admitted after further questioning that a large amount of oil was missing because "of the collapse of a transaction involving the sale of a large amount of oil to the Spanish Government, which they knew about . . . ." Nowhere does DeAngelis indicate how his not having to ship out oil because the Spanish transaction collapsed could result in an absence of oil. Indeed, this very transaction had, on Bunge's collateral security records, led to so large a build-up of oil stored at Bayonne that Mr. Klein had begun to worry about Bunge's ability to liquidate so large an amount without disturbing market prices for cash oil.

DeAngelis goes on to say that he told Mr. Klein that he was short approximately $7,000,000 worth of oil and that he had no money to pay Bunge. The extreme implausibility of this assertion is underscored by subsequent transactions between Bunge and Allied. As of the time Bunge allegedly learned of Allied's fraudulent activities, Allied owed Bunge approximately $20,000,000. Through the liquidation of the large inventory which Bunge had financed and as a matter of business policy, this had been worked down to approximately zero by early April 1963. If Bunge had thought that DeAngelis was short of oil or was issuing fraudulent warehouse receipts, it obviously would not have loaned him any more money. Yet, during the

late spring and summer of 1963 Bunge resumed its loans and other advances to Allied and, by the time of the Allied bankruptcy in November 1963, Allied again owed it very substantial sums based upon loans and other obligations secured by warehouse receipts and other documents of title.

These facts, developed by accountants representing the trustees in bankruptcy of both Allied and Amexco, demonstrate that in the last four and one-half months before the bankruptcy, Bunge relied heavily upon the existence of oil in Bayonne. Indeed, Bunge claims for approximately $15,000,000 in warehouse receipt losses were allowed in the Amexco bankruptcy proceedings. It is simply incredible that Bunge would have continued this business if any officer had believed that there was no oil in Bayonne. Obviously no businessman would lend money on security which he knew did not exist. The patent ridiculousness of such a suggestion should of itself be sufficient to show the falsity of the allegations of DeAngelis and Rotello.

DeAngelis continues the fantasy upon which plaintiff relies by asserting that he had indicated to Mr. Klein that he "had grown tired of trying to keep Allied a going con[illegible]n . . . and . . . [that he] didn't care one way or the other whe[illegible] [Mr. Klein] made the true facts of the present situation [illegible]own." Plaintiff would advance this suggestion despite the now known fact that DeAngelis thereafter proceeded to juggle and manipulate warehouse receipts for non-existent oil over a period

of more than one year to Bunge's detriment. Indeed, during that period, he intercepted at least one letter from Amexco to Bunge and substituted a forged letter replacing the correct recapitulation of Amexco's records contained in the original in order to prevent the true facts of his fraudulent activities from becoming known to Bunge.*

The affidavit continues with the assertion that, at Mr. Klein's request, DeAngelis agreed to substitute Amexco receipts for Harbor Tank receipts inconspicuously over a period of thirty to forty days and give the Harbor Tank receipts to others. DeAngelis states that he followed this schedule. The Rotello affidavit, which plaintiff also relies upon, does agree with DeAngelis' story of an exchange of Harbor Tank receipts for Amexco receipts over this time period, although significantly it does not confirm the DeAngelis affidavit in other respects.

It is simply untrue that there was any agreement to give Harbor Tank receipts to others, in exchange for Amexco receipts given to Bunge. Actually, DeAngelis made no attempt to explain the mechanics of the proposed transaction. The facts show that the exchange took place over a period of only seven days and was accomplished by the perpetration of a fraud on Bunge. These facts, as developed by the auditors for Amexco, reveal that on October 1 Allied filed a forged Bunge delivery order with Amexco. This order purported to release 82,000,000 pounds of Bunge's oil. On the same day Allied delivered new

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* Bunge did not learn of this until after the Allied bankruptcy, when a copy of the original letter was supplied to Bunge by the Federal Bureau of Investigation.

2216

Amexco receipts, covering 105,000,000 pounds of oil, to Bunge. Similar forgeries and substitutions continued until October 5.

The net result of this series was that, whereas on October 5 Bunge held Amexco receipts totaling approximately 306,000,000 pounds of oil, on Amexco's books Bunge held none. These facts demonstrate clearly that Bunge received Amexco receipts covering its security within a few days (rather than DeAngelis' thirty or forty days) of the so-called "Harbor Tank incident." Additionally, the fact that Bunge promptly received Amexco receipts reinforced the apparent truthfulness of DeAngelis' assurance that Amexco had sufficient free oil to cover the oil that had not been pumped to Harbor Tank by mistake. Finally, these facts establish that the Amexco receipts delivered to Bunge in exchange for Harbor Tank receipts were not obtained from others, as DeAngelis would have it, but rather by the fraudulent act of forging Bunge itself out of its own receipts on the records of Amexco.

No adverse inference can be drawn from Bunge's insistence upon getting out of Harbor Tank receipts. This had nothing to do with any knowledge of or suspicion that there was any shortage of oil. It had to do with the fact that the very episode itself, accepting at face value DeAngelis' explanation, demonstrated that the field warehousing operations conducted by Harbor Tank was sloppily run and therefore it might be subject to legal attack as an invalid field warehousing operation, which would undermine the security interest of warehouse receipt holders against general creditors. This would

have undercut the basic purpose of Bunge's accepting warehouse receipts. As Bunge personnel had consistently noted, the use of warehouse receipts as security for loans made the Allied-Bunge transactions risk-free, as far as Bunge was concerned, and provided the basis for Bunge's willingness to continue financing Allied.

Having previously satisfied themselves that the Amexco operation appeared to be run as a valid field warehouse, the Bunge representatives agreed that they would accept its receipts in the future but would not accept Harbor Tank receipts and requested that they be taken out of their existing Harbor Tank receipts as rapidly as possible.* In connection with this transfer, Bunge carried through with its agreement to make loans of approximately $10,000,000, in addition to the $2,400,000 already extended to Allied, during the course of the next few days, another fact refuting DeAngelis' assertion that he told Mr. Klein that he did not have enough funds to repay Bunge. No businessman would loan so great an additional sum had he just been informed that the borrower lacked sufficient assets to repay earlier loans.

These inherent and unexplained contradictions, going to the heart of the DeAngelis and Rotello affidavits which set forth the testimony upon which plaintiffs will rely, indicate the amount of credibility to which each of these witnesses

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* Plaintiff, in his pretrial memorandum has stated that there can be no dispute of the fact that Bunge's representatives demanded that Bunge be taken out of Harbor Tank on September 27 -- before Allied's oil shortage was supposedly revealed at the meeting of September 28.

will be entitled. In sum, the only conclusion that can be drawn from the conflict between these perpetrators of the swindle and the Bunge officers is that the account given by Messrs. Klein, Fornari and Kenner must be accepted. DeAngelis never informed any Bunge officer, at the meeting held on September 28 or at any other time, that any oil was missing. Instead, DeAngelis insisted that he had plenty of oil, that the episode with respect to the Harbor Tank receipts and the Superintendence inspectors was the result of a logistics mix-up, and that Bunge should weigh what DeAngelis characterized as a minor episode against the millions of dollars worth of business Bunge had previously done with Allied without any default. Indeed, the record amply demonstrates that DeAngelis actively continued until the end to prevent Bunge from finding out the true facts about his fraudulent activities.*

~~B. Haupt's Conduct~~

~~Not only do the facts likely to be adduced at trial fail to support plaintiff's contentions with respect to Bunge,~~

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* In addition to his interception of the Amexco letter to Bunge, referred to at p. 12, supra, DeAngelis has pleaded guilty to a charge of criminally submitting a false and fraudulent financial statement to Bunge in September 1963. To say the least, this attempt to deceive Bunge about his financial condition is inconsistent with DeAngelis' allegations that he had informed Bunge of his precarious financial status one year before. Additionally, he has testified elsewhere that he bribed a Bunge employee, James Caterina (its Cashier), to refrain from depositing Allied checks until funds sufficient to meet them were accumulated. This led to a loss of approximately $4,000,000 at the time of the Allied bankruptcy and is but another link in a long chain of evidence which establishes that Bunge was the innocent victim of the very witness upon whom plaintiff relies.

2254

Plaintiff's Memorandum in Opposition to Motion Respecting Evidence

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt, Plaintiff, -against- NEW YORK PRODUCE EXCHANGE; NEW YORK PRODUCE EXCHANGE CLEARING ASSOCIATION; DONALD V. MacDONALD; FAHNESTOCK & CO.; HARRY B. ANDERSON; MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED; WALTER C. KLEIN; BUNGE CORPORATION; HAROLD H. VOGEL; CONTINENTAL GRAIN COMPANY; SIDNEY FASHENA; I. USISKIN & CO.; CARL R. BERG; SOLOMON J. WEINSTEIN; and DAVID L. BOYER, Defendants.	66 Civ. 1016 (RLC)

MEMORANDUM IN OPPOSITION TO THE MOTION BY DEFENDANTS BUNGE CORPORATION AND WALTER C. KLEIN WITH RESPECT TO CERTAIN EVIDENCE

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
POINT I	
The Harbor Tank Incident Directly Relates To The Causes Of Action Asserted In The Complaint	3
POINT II	
Introduction Into Evidence Of The Facts Comprising The Harbor Tank Incident Will not Prejudice Or Confuse The Jury Nor Delay The Trial	25
POINT III	
The Causes Of Action Asserted In the Instant Action Are Completely Separate And Distinct From Those Asserted By The Trustee Against Bunge And Klein In the New Jersey Action	30
CONCLUSION	45

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Plaintiff,	:	
-against-	:	66 Civ. 1016 (RLC)
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Defendants.	:	

MEMORANDUM IN OPPOSITION TO THE MOTION BY DEFENDANTS BUNGE CORPORATION AND WALTER C. KLEIN WITH RESPECT TO CERTAIN EVIDENCE

Preliminary Statement

This memorandum is submitted by Harvey R. Miller, as Trustee in Bankruptcy of Ira Haupt & Co., a limited partnership, bankrupt ("Trustee") in opposition to the motion of defendants Bunge Corporation ("Bunge") and Walter C. Klein ("Klein") to exclude from evidence certain facts comprising an incident denominated as "the Harbor Tank Incident". The facts comprising this incident are contained in the appendix submitted by Bunge and Klein.

Bunge and Klein have asserted numerous arguments as to the non-admissibility of the facts comprising the Harbor Tank Incident. As shown below, these arguments are premised on Bunge and Klein's misunderstanding of the nature of the action brought by the Trustee against Bunge and Klein in the New Jersey state court action, and their confusion of the term "cause of action" with the facts which give rise to a "cause of action."

In Point I, below, the Trustee will demonstrate that the facts comprising the Harbor Tank Incident are relevant to this action and should be admitted into evidence as they go to the very heart of the Trustee's claims in the instant action. In Point II, below, the Trustee will dispose of the evidentiary objections made by Bunge and Klein. In Point III, below, the Trustee will demonstrate that (1) he has not split a cause of action and (2) the doctrine of res judicata is not applicable because the cause of action asserted in the New Jersey state court action is separate and distinct from the ones asserted in the instant action.

I. THE HARBOR TANK INCIDENT DIRECTLY RELATES TO THE CAUSES OF ACTION ASSERTED IN THE COMPLAINT

Rule 402 of the Federal Rules of Evidence provides

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.*

The facts comprising the Harbor Tank Incident are not only relevant, but are material to this action as well. The terms "relevant" and "material" have been defined as follows:

> "'Material' when used in respect to evidence is often confused with 'relevant', but the two terms have wholly different meanings. To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material. Professor Wigmore depicts with some acerbity the difference between relevancy and materiality, 'the inaccuracy of our usage' of the terms, and 'the harmfulness of this inveterate error'. Materiality, he maintains, is a matter of substantive law and does not involve the law of evidence. He does not include 'materiality' in the topics treated in his volumes on Evidence.
>
> * * *
>
> "Materiality must be judged by the facts and circumstances in the particular case." (Emphasis supplied.) (Footnote omitted.) Weinstock v. United States, 231 F.2d 699, 701-702 (D.C. Cir. 1956).

See also Gonzales v. United States, 286 F.2d 118, 122,

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* As demonstrated in Point II, infra, the evidentiary objections raised by Bunge and Klein are meritless.

(10th Cir. 1960). Another definition of "materiality" can be found in United States v. DeLuca, 256 F.2d 487, 491 (7th

> "'Materiality' with reference to evidence, means the property of substantial importance and it has been said that evidence is material where it is relevant and goes to the substantial matters in dispute or has a legitimate or effective bearing on the decision of the same...."

Materiality is a question of law to be decided by the court. United States v. Ivey, 322 F.2d 523, 529 (4th Cir. 1963). The proper analysis to determine materiality has been stated in Willoughby v. Jamison, 103 F.2d 821, 823 (8th Cir. 1939):

> "What facts are material to any inquiry must be determined by the nature of the right or liability asserted.... Facts essential to support a judgment are material to the issue."

Applying the foregoing analysis to the facts comprising the Harbor Tank Incident, there can be no doubt that those facts are both relevant and material to Counts I and II of the complaint. The determination of relevance and materiality will be evaluated in light of the activities and knowledge of each defendant or group thereof.

Paragraph 47 of the amended complaint alleges that the defendants "[f]rom at least the summer of 1963... knew or should have known of the aforesaid activities [the activities described in the amended complaint] of Allied and its affiliated persons and corporations and knew or should have

known of the tendencies and effects of such activities, all of which the defendants ... were required to prevent in order to discharge the duties and obligations imposed upon them by the [Commodity Exchange] Act and the By-Laws, Rules and Regulations of the [New York Produce Exchange]...adopted pursuant thereto, but failed to do." The amended complaint then states in Paragraph 56 that Haupt's injuries "were the result of the defendants'... failure to discharge the duties and obligations imposed upon [them] by the Act and the By-Laws, Rules and Regulations of the Exchange ... " These allegation lay the groundwork for the admissibility of the facts comprising the Harbor Tank Incident.

The Court, in this action, has held that:

> "...there exists at least a genuine issue of material fact in respect of whether the worthlessness of the [unregistered warehouse receipts held by Haupt] was forseeable to defendants." (378 F.Supp. at 1085).

The Court further stated:

> "Even if Haupt's insolvency were inextricably bound up in the losses here claimed, and even if Haupt's acceptance of worthless warehouse receipts is viewed as an event which occurred at the time their worthlessness was discovered rather than comtemporanecusly with their delivery, acceptance of the receipts would not break a chain of causation unless it "is so unexpected that the injury is not to be a reasonably foreseeable result of the first act." There are sufficient admissions by defendants in the record from which one might reasonably infer that in November,1963, defendants knew enough about DeAngelis'

> past business dealings to be suspicious of warehouse receipts tendered by him."
> (378 F.Supp. at 1085) (Citations omitted)

The Trustee respectfully submits that the events comprising the Harbor Tank Incident do more than give reason to infer that defendants, in November, 1963 knew enough about DeAngelis' past business dealings to be suspicious of warehouse receipts tendered by him. Rather, those facts unequivocably show that Klein and Bunge had knowledge that DeAngelis had issued fraudulent warehouse receipts and that DeAngelis would issue worthless warehouse receipts to others in the future.

The facts comprising the Harbor Tank Incident are relevant and material to the issues highlighted in this Court's opinion. Bunge and Klein knew as a result of the facts comprising the Harbor Tank Incident that DeAngelis issued worthless Harbor Tank Storage Co., Inc. ("Harbor Tank") warehouse receipts to Bunge. As a result:

a) Upon discovery of the worthless receipts Klein and Bunge confronted Allied;

b) Klein and Bunge wanted to keep the whole incident quiet;

c) Klein and Bunge arranged for the Harbor Tank warehouse recipts to be exchanged for American Express warehouse receipts, knowing that Allied

would have to pass off the worthless receipts on some unsuspecting third party;

d) The surreptitious exchange of receipts was accomplished successfully;

e) At all pertinent times during 1962, Klein was a member of the Board of Managers ("Board") and the Executive Committee of the New York Produce Exchange ("Exchange");

f) In 1963, Bunge and Allied with the knowledge and approval of Klein entered into a unique financing arrangement which involved a breach of the Commodity Exchange Act as well as the By-Laws and the Cottonseed Oil Trading Rules of the Exchange;

g) At all pertinent times during 1963, Klein was a member of the Board and the Executive Committee of the Exchange;

h) While joining in a violation of the Exchange's By-Laws and rules, Bunge and Klein did so secure in the knowledge that an ex-pit financing arrangement between Bunge and Allied guaranteed Bunge against both risk of loss and the issuance by Allied of worthless warehouse receipts;

i) Bunge and Klein knew or should have known that, just as in the case of Harbor Tank, the only way that Allied could satisfy its obligation to Bunge

would be through the issuance of other worthless warehouse receipts to unsuspecting third parties;

j) At no time prior to November 14, 1963, did Klein make known this information to the Board or the Executive Committee of the Exchange;

k) On November 14, 1963, when the Commodity Exchange Authority ("CEA") officially reported to the Exchange the positions of all the longs and shorts holding positions of 100 or more cottonseed oil futures contracts, Klein continued to keep secret his knowledge of Allied's activities despite the fact that the CEA report revealed that Allied held an overwhelming 90% concentration of the long side of the market. Klein kept secret, among other things:

i) his knowledge of the issuance of worthless Harbor Tank receipts in September of 1962;

ii) his knowledge that Allied was missing millions of dollars of oil and therefore was suffering from a serious impairment of its financial condition;

iii) his knowledge that Bunge had protected itself from financial loss in that case, only at the expense of innocent third parties;

iv) his knowledge that a 1963 ex-pit financing arrangement between Allied and Bunge were structured to eliminate any risk to Bunge of a repeat of the Harbor Tank Incident; and

v) his knowledge that Allied was paying exhorbitant interest rates to Bunge in these ex-pit transaction, reflecting the desperate financial condition of Allied.

As a member of the Exchange's Board and its Executive Committee, Klein had a fiduciary duty to the Exchange, to the industry and to the trading public. Klein's breach of that duty -- his failure to report to the Exchange his knowledge of DeAngelis' and Allied's activities which as learned during the course of the Harbor Tank Incident--was at least partially responsible for the Exchange's failure to fully investigate DeAngelis and Allied.

As a member of the Board, Klein owed a fiduciary duty of honesty, good faith and diligence to the Exchange and its members. Thus, Klein had a duty to disclose his knowledge of Allied's activities to the Exchange. If Klein had informed the Exchange, it presumably would have carried out its duties and investigated Allied and DeAngelis. His failure to disclose information vital to that Board's function and purpose was a breach of that duty.

Klein's position on the Board is analogous to that

of a director on any corporation's board of directors.

> "The function of the board of directors is to manage the business of the corporation; in order to do so it may exercise all necessary powers." 1 Hornstein, Corporation Law and Practice, §431 at 525 (1959). (Emphasis supplied.) See N.Y. Business Corporation Law §701 (McKinney 1963).

Similarly, the By-Laws of the Exchange state:

> "The property, affairs business and concerns of the Exchange shall be vested in and managed by [a] 'Board of Managers' ..." Exchange By-Laws, Sec. 12. (Emphasis supplied.)

> "The Board of Managers shall have full power and authority to do all proper and needful things to carry out effectively the objects and purposes for which the Exchange was incorporated, and to do such other lawful proper and needful things as in their judgment will tend to promote the usefulness of the Exchange and carry out the purposes of its incorporation." Exchange By-Laws, Sec. 13. (Emphasis supplied.)

As the function and purpose of the Board of Managers is exactly the same as that of a board of directors, Klein as a member of the Board is bound by the same law that binds any corporate director.

Since the Exchange is incorporated in the State of New York, New York law governs the relationship between it and its directors (the Board of Managers). In Gilderhorn v. Lum's Inc., 335 F. Supp. 329, 332 (S.D.N.Y. 1971), Judge Tyler stated:

> "New York follows the general choice of law principle that the law of the state of incorporation governs the existence and

> extent of corporate fiduciary obligations as well as the liability for violations of such obligations... This rule was expressed in Diamond [v. Oreamundo, 24 N.Y. 2d 494, 503]... when the court stated that as regards the '... duties and obligations of directors and officers and their relation to the corporation and its shareholders... [t]he primary source of the law in this area ever remains that of the State which created the corporation.'" (Citations omitted.)

See also, Hausman v. Buckley, 299 F.2d 696, 703 (2d Cir. 1962).

The case law of New York is replete with decisions stating that corporate directors and officers occupy a fiduciary or trustee relationship to the corporation and owe an active duty of faithful conduct. E.g., People v. Marcus, 261 N.Y. 268, 276-77 (1933); Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185, 193 (1919); Kavanaugh v. Commonwealth Trust Co., 223 N.Y. 103, 106 (1918); Nichols-Morris Corp. v. Morris, 174 F. Supp. 691, 696-697 (S.D.N.Y. 1959), appeal dismissed, 272 F.2d 586 (2d Cir. 1959).

In the Kavanaugh Knitting Co. case, supra, the New York Court of Appeals said:

> "The directors are bound by all those rules of conscientious fairness, morality and honesty in purpose, which the law imposes as the guides for those who are under the fiduciary obligations and responsibilities. They are held, in official action, to the extreme measure of candor, unselfishness and good faith. Those principles are rigid, essential and salutary."

That Court also stated in the Commonwealth Trust Co. case, supra:

> "[Directors] are summoned to the same degree of case and prudence that men prompted by self-interest generally exercise in their own affairs. They should know of and give director to the general knowledge of the manner in which the business is conducted.... No custom or practise can make a directorship a mere position of honor void of responsibility, or cause a name to become a substitute for care and attention. The personnel of a directorate may give confidence and attract custom; it must also afford protection." (Citations omitted.)

Similarly, the First Department in Foley v. D'Agostino, 21 A.D. 2d 60, 66-67 (1sr Dept. 964) stated:

> "Directors and officers shall discharge the duties of their respective positions in good faith'. They may not assume and engage in the promotion of personal interests which are incompatible with the superior interests of their corporation. Officers and directors of a corporation owe to it their undivided and unqualified loyalty....They should never be permitted to profit personally at the expense of the corporation. Nor must they allow their private interests to conflict with the corporate interests. These are elementary rules of equity and business morality. Courts of equity must ever enforce strict compliance with these rules.'" (Citations omitted.)

Just as each director on a corporation's board has the responsibility and obligation to carry out the objects of the corporation, Section 13 of the Exchange's By-Laws charged Klein as a member of the Board with the responsibility and obligation to carry out the objects of the Exchange. Section 2 of the By-Laws provides in pertinent part:

> "The objects of this Association [N.Y.P.E.] are ... to acquire, preserve and disseminate valuable business information... between its members." (Emphasis supplied.)

Klein in his fiduciary capacity as a member of the Board was charged with an affirmative duty of carrying out the objects of the Exchange. As the United States Supreme Court said in SEC v. Capital Gains Research Bureau, 375 U.S. 180, 194 (1963):

> "Courts have imposed on a fiduciary an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts'..."

As a result of the Harbor Tank Incident, Klein had in his possession facts and information about Allied and DeAngelis which were vital to the Board's proper regulation and management of the Exchange and its members. Thus, in his fiduciary capacity as a member of the Board, Klein had an affirmative duty to disclose his knowledge of the fraudulent activities of Allied to the Board and to the Exchange. Klein, however, chose not to disclose this information to the Exchange, but rather chose to keep silent in order to protect Bunge from a loss resulting from its financing of DeAngelis and Allied, as well as a loss in its other relationships with Allied. His breach was a continuing one. In 1963, the ex-pit financing sought by Allied and approved by Bunge and Klein could only be achieved at the expense of unwitting, innocent third parties. Klein disregarded his duty to the Exchange and its members in order to protect the selfish interests of his

employer, Bunge. Klein's failure to disclose, an omission, was a breach of his duty for which Klein should be held accountable.

Defendants have raised the alleged unforseeability of the worthlessness of unregistered warehous receipts as a defense in this action. The Court has acknowledged that forseeability is now at issue. That Allied would issue worthless unregistered warehouse receipts to innocent third parties such as Haupt was imminently forseeable to Bunge and to Klein in 1963. Bunge, Klein and the Exchange cannot now be heard to claim that the failure of the Exchange to properly regulate itself in 1963 was not the proximate cause of Haupt's loss subsequent to November 14, 1963.

> "It is well-established law that corporate directors are responsible for acts of omission, such as neglect of their duties, as well as the commission of wrongful acts." Platt Corp. v. Platt, 42 Misc. 2d 640, 643 (Sup. Ct. N.Y.), aff'd, 258 N.Y.S. 2d 629 (1sr Dept. 1964), rev'd on other grounds, 17 N.Y. 2d 234 (1966).

The fact that the Harbor Tank Incident occurred sometime prior to the events complained of does not relieve Klein of his duty to disclose because this duty is continuous. In Nichols-Morris Corp. v. Morris, supra, a defendant officer and director alleged as a defense to an action charging a breach of fiduciary duty that although he was a director and officer, his active duties as such had

ended several years before and accordingly, he had no fiduciary duty thereafter. Judge Weinfeld speaking for the District Court said:

> "The classical restraints imposed by law upon directors or officers are not so easily shed. One who accepts, and continues in, office takes it with all its responsibilities and duties, and must measure up to its demands. Any other rule would result in erosion of the standard of loyalty imposed upon a corporate fiduciary. To suggest that one can, by disregard of his duty, immunize himself from fiduciary responsibility would undermine the strict code of trustee conduct the Courts have steadfastly enforced. (At 696-97).
>
> * * *
>
> "The duty of loyalty owed by the defendant to the plaintiff continued as long as he remained its Director and President. He could not shed his responsibilities at will. (At 698). (Emphasis supplied.)

Klein's duty to disclose his knowledge of facts material to the Exchange's regulation of the contract market was a continuing duty as long as Klein remained on the Board and the Executive Committee. Indeed, Klein's duty to disclose became more acute as Allied's and DeAngelis' activities in the cottonseed oil futures marketplace increased. Klein, who had knowledge of these new activities by Allied and DeAngelis, knew or should have known, that an investigation was necessary. As time went on, the need for Klein's disclosure became more compelling.

The fact that Klein was also an officer of Bunge and had possible conflicting duties with respect to Bunge's interests could not be used as an excuse for his non-disclosure. The New York Court of Appeals stated in People v. Marcus, supra:

> "A director owes loyalty and allegiance to the corporation he undertakes to serve and his willful derelictions are not excusable because his numerous directorates make his duties conflicting. He cannot choose which he will serve, so long as he chooses to serve all. No one is compelled to be a director, but once the office is assumed, it carries with it the light burden of active, diligent and single-eyed service." (At 277). (Emphasis supplied.)

Even though Klein in the first instance learned of the Harbor Tank Incident as part of his responsibilities as President of Bunge, he was still under an affirmative duty to disclose the information to the Board and the Exchange.

Klein's failure to discharge his duties to the Exchange which led in part to the Exchange's failure to regulate and which, in turn, resulted in Haupt's injury can be imputed to both Bunge and the Exchange. Thus, the Harbor Tank Incident is relevant and material to the issue of the Exchange's and Bunge's liability, as well as Klein's, for the failure to regulate the contract market.

The Exchange should be held liable for Klein's failure to perform his function as a member of the Board.

The First Department in Diamond v. Oreamundo, 29 A.D. 2d 285, 287 (1st Dept. 1968), aff'd, 24 N.Y. 2d 494 (1969) has stated:

> "'A corporation aggregate can only act by its agents. Its trustees or directors are its agents for managing its affairs.' (Carpenter v. Danforth, 52 Barb. 581, 584)."

See also, Pearson v. Youngstown Sheet and Tube Company, 332 F.2d 439, 442 (7th Cir. 1964). It is hornbook law that principals are liable for the acts of their agents, 2 N.Y. Jur. Agency §242. In United States v. Uniroyal, Inc., 300 F. Supp. 84, 95 (S.D.N.Y. 1969), the District Court imposed liability on the defendant corporation for the acts of its agents. Judge Pollack stated:

> "Liability may be imposed upon a corporation for the acts of its agents, contrary to their orders and without authority, express or implied, merely because they were committed in the course of the corporation's business and within the scope of the agent's employment."

See also, Tobman, v. Cottage Woodcraft Shop, 194 F. Supp. 83, 87 (S.D. Cal. 1961). Part of the Exchange's business was to regulate the contract market. Klein's dereliction of his duty directly related to the Exchange's failure to regulate. Moreover, this failure to disclose by Klein was within the ambit of responsibility assumed by him as a member of the Board. Thus, Klein's dereliction can and should be charged to the Exchange.

2305

Similarly, Bunge should also be liable for Klein's breach of his duty. Bunge, through the efforts of its other officers, Richard Forti, Harry Fornari and Hamilton Kenner, actively assisted Klein to breach his duty to the Exchange. Messrs. Fornari and Forti were vice presidents in charge of Bunge's Fats and Oils Department. Mr. Kenner was general counsel and a vice president of Bunge. Each of these Bunge officers had intimate knowledge of the Harbor Tank Incident; of the ex-pit financing between Bunge and Allied designed to give Bunge riskless profits in violation of the Commodity Exchange Act, the By-laws and trading rules of the Exchange; and of Allied's financial ability and conditions.

Each of these Bunge officers worked directly with the company's President, Klein, with respect to the foregoing Allied matters. At least some of these Bunge officers, in addition to Klein, were privy to the information conveyed by Merrill Lynch, Pierce, Fenner & Smith to Harry B. Anderson concerning Allied's position in November 15, 1963. At least some of these Bunge officers, in addition to Klein, were privy to the allegedly confidential information received from the CEA on November 14, 1963 that Allied held 90% of the open long position in cottonseed oil futures. And at least some of these Bunge officers, in addition to Klein, were participants in the Bunge decisions to go short in those futures in the face of the CEA information and despite Klein's duties to regulate the Exchange.

Finally, some of these same Bunge officers directed Bunge to sell ahead of its customer, Allied, in the soybean oil futures market on the Chicago Board of Trade in a final act of greed designed to profit from Klein's fiduciary position on the Exchange. Bunge would be liable because:

> "[o]ne who assists a fiduciary such as a director, to breach his duties as fiduciary, is liable to the injured party for the damage resulting from the fiduciary's dereliction..." Leven v. Birrel, 92 F. Supp. 436, 444 (S.D.N.Y. 1949).

See also Irving Trust Co. v. Deutsch, 73 F.2d 121, 123 (2d Cir. 1934).

Moreover, Bunge's liability arises in a second way. The Exchange is a membership corporation which permits only individuals to be members. These individuals represents the interests of various firms or corporations who by law are not permitted to be a member of the Exchange. Bunge had this type of arrangement in 1963, i.e., Klein and other Bunge officers served as representatives of the corporation on the Exchange for Bunge.* In the recent case of Vandervelde

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* Klein's membership application dated November 27, 1959 states that he intended to function as a member of the Exchange "to represent the corporation". Further, the principal's guarantee in connection with Klein's application for membership, executed and acknowledge by Bunge Corp. on November 27, 1959, states that Klein applied for Exchange membership at Bunge's suggestion; and that Bunge thereby guarantees

> "...the faithful performance of any contracts [Walter Klein] may make in our name and hold ourselves responsible for his acts a a member of the Exchange, during such time as he may remain in our employ..." (See Trustee's Exhibit for Identification).

v. Put and Call Brokers and Dealers Ass'n, 344 F. Supp. 118, 156 (S.D.N.Y. 1972), the Court was faced with a similar situation. There the Court found individual defendants who, like Klein, were members of an association "to represent, the corporation" liable for a breach of their duty to the association. In Vandervelde, Judge Pollack specifically found that the firms which employed such principals were also liable.

> "Each of the individual defendants liable was a principal of one of the broker-dealer defendants with the exception of Harnden and Linburn who were the president and secretary of the Association, respectively, and members of stock brokerage firms. The evidence clearly indicates that the activities of the individual defendants in the management of the Association were well within the scope of their authority from the firms they represented; indeed in most cases the firms were dominated by these individuals and they managed the Association as well. While it may be true that authority to commit tortious acts is not lightly assumed, the nature of the relationship between the firms and the Association justifies a finding that the participation of option brokers and dealers in the activities of the Association was an integral part of their employment in the industry. Moreover, the firms had a direct interest in the subject matter of the Vandervelde controversy. The Court concludes that the conduct of the individual defendants found liable is properly imputed to the broker-dealer defendant firms." (Emphasis supplied.)

Accordingly, since liability can be imputed to Bunge, Klein and the Exchange because of their failure to regulate, the facts comprising the Harbor Tank Incident which demonstrate

that failure to regulate are relevant and material to this action.

The Harbor Tank Incident also directly relates to Count II of the amended complaint since all of the defendants conspired to prevent the Exchange from regulating to the detriment of Haupt. The second claim alleges a conspiracy by defendants in violation of Section 1 of the Sherman Act. Specifically, paragraph 60 of the amended complaint alleges that the defendants combined, conspired and agreed among themselves:

> "To abdicate responsibility for discharging the duties and obligations imposed upon them by the Act and the By-Laws, Rules and Regulations of the Exchange and the Association adopted pursuant thereto."

A conspiracy is a joint undertaking having an unlawful purpose and arising out of an agreement. Standard Oil Co., v. Moore, 251 F.2d 188, 196 (9th Cir. 1957). It is a combination of two or more persons by concerted action to accomplish a crime or unlawful purpose. Rutledge v. Electric Hose and Rubber Company, 327 F. Supp.1267, 1276-74 (C.D. Cal. 1971). No express agreement is necessary to constitute an unlawful combination or conspiracy. American Tobacco Co. v. United States, 328 U.S. 781, 809 (1945). It is sufficient if persons with knowledge that concerted action is contemplated and invited, "give adherence to and then participate in a scheme." F.T.C. v. Cement Institute, 333 U.S. 683, 716

(1947). If the Trustee can prove the existence of a conspiracy by all of the defendants, then the agency principle that attaches to conspiratorial conduct will come into play.

It has long been held that "a conspiracy creates an agency relationship, so that each member is authorized by the other members to perform acts in furtherance of the common objective [of the conspiracy]." Standard Oil v. Moore, supra, at 211. Conversely, "[o]ne who enters a conspiracy late, with knowledge of what has gone before, and with the intent to pursue the same objective, may be charged with preceding acts in furtherance of the conspiracy." (Emphasis supplied.) Industrial Bldg. Materials, Inc. v. Inter-Chemical Corp., 437 F.2d 1336, 1343 (9th Cir. 1970). This is because "the conspiracy is, in effect, renewed each day of its existence." Riss & Company v. Ass'n of American Railroads, 170 F. Supp. 354, 371 (D.D.C. 1959). Thus, a co-conspirator need not know "the exact limits of the illegal plan or the identity of participants therein." Hoffman-LaRoche, Inc. v. Greenberg, 447 F.2d 872, 875 (7th Cir. 1971).

As Mr. Justice Brandeis stated in Board of Trade v. United States, 246 U.S. 231, 238 (1918),

> "....Every agreement concerning trade, every regulation of trade restrains. To bind, to restrain, is of their very essence. The true test of legality is whether restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To

> determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraints is applied..."

The Trustee contends in Count II of its amended complaint that the defendants failed to regulate properly the cottonseed oil futures market on the Exchange in 1963; and that, as a result, Haupt, was injured.

Among the activities which the Trustee claims the defendants failed to regulate on the Exchange during 1963 were the trading activities of Allied in cottonseed oil futures contracts. While Allied itself was not a member of the Exchange during 1963, it did conduct its trading activities in futures contracts during all of 1963 through brokers, who were themselves members of the Exchange, including, during the latter part of 1963, Haupt.

The Trustee contends that defendants, pursuant to a limited exemption from the antitrust laws, were required to operate the Exchange in good faith. Defendants not only failed to regulate properly the trading on the Exchange during 1963, but most of the defendants failed to perform their duties for improper reasons which demonstrate wanton, willful, reckless, or bad faith actions or failure to act. As a result of this bad faith failure to regulate defendants have violated the antitrust laws of the United States which prohibit contracts,

combinations or conspiracies in restraint of trade. In other words, defendants' failure to regulate in good faith has caused them to lose the limited exemption from the antitrust laws which allow regulators of futures markets to restrain trade without subjecting themselves to the penalties required in connection with violations of antitrust laws. See Maryland & Virginia Milk Produce Ass'n, Inc. v. United States, 362 U.S. 458 (1968) (Loss of agricultural cooperative's exemption from antitrust laws); United States v. Fish Smokers Trade Council, Inc. 183 F.Supp. 227 (S.D.N.Y. 1960) (Loss of union's exemption from antitrust laws).

More particularly, Klein learned of the facts comprising the Harbor Tank Incident in September of 1962. The conspiracy alleged in the complaint occurred during the summer and fall of 1963. Klein, then, entered the conspiracy with knowledge of the incident. Since Klein's duty to disclose his knowledge of the Harbor Tank Incident was a continuing duty, his participation in the conspiracy was reinforced by his refusal to disclose the Harbor Tank Incident. In other words, since Klein and others had agreed to prevent the Exchange from properly regulating itself, Klein, furtherance of this agreement, continued to withhold and actively suppress material information which, if disclosed, would force the Exchange to investigate Allied and DeAngelis. This act of suppression is an act in furtherance of the

conspiracy, and is chargeable to the other defendants and should be admitted into evidence to be used against them.

II. INTRODUCTION INTO EVIDENCE OF THE FACTS COMPRISING THE HARBOR TANK INCIDENT WILL NOT PREJUDICE OR CONFUSE THE JURY NOR DELAY THE TRIAL

Bunge and Klein rely on Rule 403 of the Federal Rules of Evidence to support their evidentiary objections. As demonstrated in Point I, supra, the facts comprising the Harbor Tank Incident do not merely tangentially relate to this action, but go to the very heart of it. Bunge and Klein's objections must be weighed against the highly probative value of the evidence. McCormick On Evidence, §152 at 319-320 (1954). Bunge and Klein have not made a showing of prejudice, delay or confusion which would outweigh the probative worth of the facts comprising the Harbor Tank Incident.

With respect to the objection of prejudice, Judge Weinstein has stated in his treatise that in determining that objection

> "the better approach on the question of admissibility is to view both probative force and prejudice most favorably towards the proponent, that is to say, to give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." Weinstein's Evidence, ¶403[03], p. 403-18 (1975).

The Trustee submits that the relevancy and materiality of the facts comprising the Harbor Tank Incident far outweigh any possible prejudice.

Bunge and Klein argue that admission into evidence of the facts comprising the Harbor Tank Incident is prejudicial because those facts are easy to comprehend and would undoubtedly divert the attention of the jury from the real issues. They then assert the conclusion; the "evidence will, of course, be highly inflammatory...." Suffice it to say, the Trustee knows of no rule of law which excludes evidence because it is easy to understand.

The Second Circuit has recognized the discretion that a trial judge has to admit or exclude allegedly prejudicial evidence. However, where the evidence, as here, has significant probative value, the Second Circuit has upheld its admission into evidence. See, e.g., United States v. Ravich, 421 F.2d 1196, 1204-1205 (2d Cir. 1970), cert. denied 400 U.S. 834 (1970); United States v. Flynn, 216 F.2d 354, 365 (2d Cir. 1954).*

The array of cases cited by Bunge and Klein stand for no different proposition. In International Shoe Mach. Corp. v. United Shoe Mach. Corp., 315 F.2d 449 (1st Cir.), cert. denied, 375 U.S. 820 (1963), a case cited in their brief, the First Circuit applied the analysis used by the Second Circuit. In that case, the question was the admission of "background evidence."

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* See also Household Goods Carriers Bureau v. Terrel, 452 F.2d 152 (5th Cir.1971), discussed in greater detail in Point III, infra. In Terrel, the Fifth Circuit stated that a libelous letter could have a prejudicial effect. Nonetheless, the court found the materiality of that evidence outweighed the prejudicial effect. Accordingly the letter was held to be admitted.

> "The next question concerns the plaintiff's argument that these items should have been admitted as "background" evidence.
>
> * * *
>
> Again we are unwilling to accept plaintiff's contention. While plaintiff continually stresses the relevancy of these matters, relevancy is not the only factor to be considered by a court in determining the admissibility of evidence of this character. Courts traditionally must weigh the probative value of the evidence sought to be admitted against the capacity for prejudice which the evidence might engender. Where the prejudice quotient is high, this fact will frequently render inadmissible evidence which - from a purely logical standpoint - may have a significant probative thrust....'[I]f certain evidential material, having a legitimate probative standpoint - may have a significant probative thrust....'[I]f certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, * * * there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose.'" (Emphasis supplied)

The Trustee respectfully submits that the striking clarity of the Harbor Tank Incident is indispensable to show Klein's, Bunge's and the Exchange's failure to regulate. The evidence can in no way be construed to be background evidence. Further, it should be evident that the legitimate probative value of the evidence outweighs any prejudicial impact which it may otherwise have. However, to the extent that any such prejudice might exist, this Court can issue proper limiting instructions which will enable the jury to assimilate these easily understood facts in passing upon the issues in this case.

Bunge and Klein assert that the introduction into evidence of the facts comprising the Harbor Tank Incident will confuse the jury. Of course, just three pages before in their brief, Bunge and Klein assert that these very same facts "are easy to comprehend."* And indeed they are. The facts comprising the Harbor Tank Incident will be succinctly presented at trial by one witness. The testimony will not involve statistics or other data nor will it involve terms and definitions not familiar to the jury. Certainly the testimony, does not involve the types of evidentiary material, which have led courts to exclude them. (See cases cited in Bunge and Klein's brief).

Bunge and Klein also assert that the introduction into evidence of the facts comprising the Harbor Tank Incident will unnecessarily prolong the trial. Bunge and Klein disingenuously argue that their defenses to the Harbor Tank Incident will take "weeks of trial." In support of this contention, they quote from the Trustee's Application for Approval of the Settlement of the Harbor Tank Incident (which is quoted in pertinent part below at pages 40-42).

This argument is completely devoid of merit. First, it was anticipated by the parties in the New Jersey state court

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* Bunge and Klein assert that collateral issues will be raised which will confuse the jury. No identification of these issues is made. In an event, assuming arguendo that happens, the Trustee will gladly accede to this Court's judgment in disposing of those issues.

action and agreed to in that action's pre-trial order that the entire trial would last, at most, two weeks. Second, a full reading of the Trustee's Application shows that his concern was not with the length of the trial, but with the novel issues of law which he asserted in that action. Third, two of the defenses raised in the New Jersey state court action are not applicable to this action, e.g. failure to state a cause of action upon which relief can be granted and statute of limitations. The remaining four defenses have been asserted in substance not only by Bunge and Klein, but by the other defendants in this action. Accordingly, those defenses will be tested regardless of whether the facts comprising the Harbor Tank Incident are admitted into evidence.

Bunge and Klein's entire delay argument is based upon their misunderstanding of the relevancy and materiality of the facts comprising the Harbor Tank Incident to this action. Such misunderstanding is reflected in the cases cited by them in support of their position. For example, Bunge and Klein rely on Olin-Mathieson Chem. Corp. v. Allis-Chalmers Mfg. Co., 438 F.2d 833, 838 (6th Cir. 1971) which excluded certain evidence as confusing and causing delay to the trial. On appeal, appellant argued that the proof should have been admitted. The Sixth Circuit rejected this argument. Bunge and Klein failed to quote the entire holding

of the Court which shows that the excluded evidence was only peripherally related, if that, to the issue as trial.

> "Olin-Mathieson's second argument contends that the November incident was admissible to support its assertion that the failure of the protective devices after the malfunction occurred materially increased the damage in June, and to refute any assertions to the contrary by I-T-E. Since the question of damages was not at issue, such proof would have been without relevance. The jury had before it evidence of the failure of the protective devices as bearing on the issue of liability. Had a verdict been returned against I-T-E, the difference in damages between the two incidents would have been of probative value on the question of what amount of damages was attributable to I-T-E. We believe that any possible benefit was outweighed by the considerations of the undue prolongation of the trial and confusion of issues which would have accompanied receipt of this evidence." (Emphasis supplied)

In conclusion, none of the evidentiary objections raised by Bunge and Klein outweigh the probative value of the facts comprising the Harbor Tank Incident.

III. THE CAUSES OF ACTION ASSERTED IN THE INSTANT ACTION ARE COMPLETELY SEPARATE AND DISTINCT FROM THOSE ASSERTED BY THE TRUSTEE AGAINST BUNGE AND KLEIN IN THE NEW JERSEY ACTION

In Points II and III of their memorandum of law, Bunge and Klein, citing a myriad of cases, assert that the admission into evidence of the facts comprising the Harbor Tank Incident is barred by the doctrine of res judicata and the doctrine preventing the splitting of a cause of action.

Bunge and Klein make no effort to define the terms "res judicata" and "cause of action." And for good reason, since the definitions of those terms conclusively establish that neither doctrine is applicable in the instant action.

The doctrine of res judicata* prevents the relitigation of the same claim between the same parties when there has been a prior judgment rendered on the merits of that claim. As stated by the Supreme Court in Com'r v. Sunnen, 333 U.S. 591, 597 (1947):

* It should be noted that the doctrine of res judicata is often confused with the doctrine of collateral estoppel. The distinction between the two was enunciated by the Supreme Court in Lawlor v. National Screen Service Corp., 349 U.S. 322, 326 (1955).

> "The basic distinction between the doctrines of res judicata and collateral estoppel, as those terms are used in this case, has frequently been emphasized. Thus, under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit."

The doctrine of collateral estoppel is not applicable because the facts comprising the Harbor Tank Incident were never litigated. See Lawlor v. National Screen Service Corp., supra, where the Supreme Court held that where a prior suit was settled before trial, the facts giving rise to the claim were never actually litigated and the doctrine was not applicable.

> "The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations."

The application of the doctrine of res judicata operates "to prevent the splitting of a single cause of action and the use of several grounds for recovery under the same action as the basis for separate suits." Mendez v. Bowie, 118 F.2d 435, 440 (1st Cir. 1941) cert. denied 314 U.S. 639 (1941). The doctrine of res judicata is not applicable because the causes of action asserted in the instant action are separate and distinct from those asserted in the New Jersey state court action.

Federal law governs the determination of whether a cause of action has been split or two separate ones exist. Royal Indemnity Comp. v. City of Erie, 326 F.Supp. 571, 573 (E.D. Pa. 1971). It is a basic principle of jurisprudence that "two elements must coalesce before a cause of action can exist: (a) a breach of some legally recognized duty owed by defendant to the plaintiff; (b) which causes the plaintiff some legally cognizable damage." Hodge v. Service Machine Company, 438 F.2d 347, 349 (6th Cir. 1971).

Moreover, it is settled law that "[a] cause of action or claim does not consist of 'facts', but rather it is the 'wrong' which the facts together compromise." RCA Mfg. Co. v. Columbia Recording Corp., 36 F.Supp. 247, 251

2323

(S.D.N.Y. 1940) citing Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1926). (Emphasis supplied). See also, Burns Bros. v. The Central R.R. of New Jersey, 202 F.2d 910, 911-912 (2d Cir. 1953); Hermann v. Braniff Airways, Inc., 308 F.Supp. 1094, 1099 (S.D.N.Y. 1969).

It is equally well-settled that one fact pattern can give rise to several causes of action. United States v. Pan American Petroleum Co., 55 F.2d 753, 776, cert. denied, 287 U.S. 612 (1932),("the same transaction may give rise to more than one cause of action.") See also, Household Goods Carriers Bureau v. Terrel, 452 F.2d 152, 157 (5th Cir. 1971); Altherton v. Anderson, 86 F.2d 518, 521-522 (6th Cir. 1936); Bankers Trust Comp. v. Pacific Employers Insur. Co., 282 F.2d 106, 110 (9th Cir. 1960); Woodbury v. Porter, 158 F.2d 194, 195 (8th Cir. 1946). Litigants need not assert all causes of actions available to them in one proceeding. See, e.g., Household Goods Carriers' Bureau v. Terrel, supra; Velsicol Corp. v. Hyman, 103 F. Supp. 363, 366-367 (D. Col. 1951) and cases cited therein.

An examination and comparison of the complaints filed in the instant and New Jersey actions shows that the causes of action asserted in each are separate and distinct from one another.

As this Court is well aware, in November, 1969, the Trustee served an amended complaint upon the Exchange; the

New York Produce Exchange Clearing Association ("Association"); Klein and several other defendants ("defendants"). The amended complaint contains three independent claims for relief. The first under the Commodity Exchange Act (7 U.S.C. §§1-17(a)), the second under federal antitrust laws (15 U.S.C. §1 et seq.), specifically Section 1 of the Sherman Act, and the third under the Federal Bankruptcy Act, specifically Section 70 (11 U.S.C. §110 (e)).

More particularly, Count I alleges that under the Commodity Exchange Act ("Act"), a cottonseed oil futures contract may only be traded on an exchange designated as a "contract market" by the Secretary of Agriculture. It is further alleged that, as a condition of its designation, the Exchange was required by the Act to regulate the market and prevent certain types of activity so as to maintain an orderly market for cottonseed oil futures contracts; to prevent sudden or unreasonable fluctuations in price; to prevent undue and undesirable speculative activity; to prevent manipulation of prices and cornering or attempts to manipulate prices or to run a corner; to insure fair practice and honest dealing on the Exchange; and to operate the Exchange and the Association in a just and equitable manner.

Finally, it is alleged that by virtue of the acts and failures to act set forth in subparagraph A-Z of paragraph 56 of the amended complaint, and in derogation of their

statutory duties and obligations, defendants failed to regulate the market and to prevent the types of activities described therein.

Count II of the amended complaint realleges the facts and further alleges that these facts constitute violations of the antitrust laws, specifically Section 1 of the Sherman Act. Thus, it is alleged that beginning in or about the summer of 1963, defendants engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in cottonseed oil and cottonseed oil futures contracts by combining, conspiring and agreeing among themselves to, among other things, abdicate their statutory duties and obligations; to present the prices of cottonseed oil futures contracts on the Exchange from reflecting the general value of the commodities; to control and fix prices of said contracts from and after November 14, 1963, by allowing prices subsequent to that date to decline to a predetermined level; and to permit certain of the defendants to profit from their transactions and protect themselves from the financial loss which they placed upon Haupt.

It is further alleged that said combination and conspiracy and the acts committed and omitted in furtherance thereof were not done in good faith or in a fundamentally fair manner.

Count III arises under the federal bankruptcy law

and realleges the facts which give rise to Counts I and II. It is brought against the Exchange and the Association on the ground that:

> "The transfer of $12,000,000, made or suffered by Haupt to the Association is fraudulent as against creditors of Haupt and null and void under applicable provisions of federal law." (11 U.S.C. §110(e)).

Thus, the present action is comprised of three separate causes of action arising from violations of three separate federal statues. None of these causes of action was asserted by the Trustee in his action against Bunge and Klein in New Jersey. Nor was the cause of action asserted in the New Jersey action asserted in the instant action. The New Jersey action was an action grounded in tort. A brief examination of the history of that action demonstrates, that while certain underlying facts may relate to both actions, the cause of action asserted by the Trustee in New Jersey is not now, nor has it ever been, asserted in this action.

In accordance with Order of Edward J. Ryan, Bankruptcy Judge, dated July 8, 1968, a complaint, naming as defendants Bunge Corporation and Walter Klein, was filed in the Superior Court of New Jersey, Law Division, Essex County on August 9, 1968 (the "The New Jersey action"). The complaint in the New Jersey action sought to recover damages for the tortious injuries sustained by the Bankrupt as a result of Bunge and Klein's failure to disclose, and their subsequent

2327

suppression of, knowledge of the false and fraudulent activities of Allied Crude Vegetable Oil Corporation.

Eleven separate counts were asserted in the New Jersey complaint. In each of the first ten counts compensatory damages were sought relative to particular warehouse receipts issued, or purportedly issued by Harbor Tank. Although Harbor Tank had certain storage tanks licensed by the Exchange, the tanks involved in the New Jersey action were not among them. Total compensatory damages sought was $4.1 million. In the eleventh count, punitive damages were sought.

On September 10, 1968, shortly after the filing of the complaint, Bunge and Klein served a notice removing the action from the Superior Court of New Jersey, Law Division, Essex County, to the United States District Court for the District of New Jersey. On October 18, 1968, Bunge and Klein filed their answer to the complaint denying the eleven causes of action and raising six affirmative defenses.*

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* Bunge and Klein at the time of the filing of their answer were, of course, aware that the Trustee had previously commenced the instant action in 1966. Significantly, neither Bunge nor Klein raised as a defense to the New Jersey action that the Trustee had split a cause of action.

2328

The Trustee, on November 14, 1968, moved to remand the action to the New Jersey state court. On March 11, 1969 the District Court ordered the action remanded to the Superior Court of the State of New Jersey. The District Court specifically held:

. . . .

> "This court is of the opinion and so rules that the basis for this action revolves about the tortious conduct of the defendant rather than the validity or construction of a federal statute."* (Emphasis supplied).

Following remand, the parties conducted pre-trial discovery in the New Jersey action.

On March 23, 1973, a pre-trial conference was held before Judge Kimmelman, the presiding judge, at which it was stipulated between the parties that all pre-trial testimony taken in all related proceedings, including the instant action, could be used in the prosecution and defense of the New Jersey action. It was recognized by the parties that evidence given in other proceedings was also relevant to the causes of action asserted by the Trustee in the New Jersey action. The Judge ordered that proposed stipulated facts be submitted by each side and that trial memoranda also be submitted.

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* It is also of significance that the Trustee's three causes of action in the instant action are all based on federal statutes raising questions of federal law.

In April, 1973, tne Trustee submitted his proposed stipulated facts and conclusions of law. The Trustee asserted in his conclusions of law that:

> "The legal contentions of plaintiff are (a) prima facie tort--defendants intentionally injured Haupt without justification; (b) fraud--defendants actively concealed the fraudulent activities of Allied; (c) violation of statutory obligation -- both the laws of the United States and New Jersey make it a crime to conceal a felony; (d) unnamed tort--tort liability can be imposed in the event of forseeable harm to "established protected interests" for conduct purposively corrupt by conventional standards, conduct intentional as to consequences or conduct utilizing vicious means as determined by conventional standards; (e) negligence -- a duty exists where an actor acts with knowledge of peculiar conditions which create a high degree of risk of intentional conduct; (f) intentional tort-- defendants intentionally interfered with the interests of others; (g) wanton misconduct--defendants showed a conscious indifference to the consequences of its activities."

The Trustee's trial brief--only selective portions of which are included in Bunge and Klein's motion papers--supporting these theories, was filed on June 1, 1973.

A second pre-trial conference with Judge Kimmelman was held on Friday, May 11, 1973. At that time, the Judge entered a pretrial order which stated that the nature of the action was a "[t]ort action by Trustee in Bankruptcy of Haupt against defendant corporation and its president, generally based upon fraudulent concealment of knowledge concerning activities of Allied Crude Vegetable Oil and Anthony DeAngelis."

The pre-trial order was signed not only by Judge Kimmelman, but by counsel for both parties.

Before trial was held, the parties agreed to settle the action as between them. A stipulation of settlement, subject to the approval of the Bankruptcy Court, was agreed to by the Trustee, Bunge and Klein in or about October, 1973. That stipulation provides in pertinent part:

> " NOW, THEREFORE, it is hereby stipulated and agreed by and between the undersigned as follows:
> 1. Bunge shall pay to the Haupt Trustee, the sum of SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($750,000.00) in full and complete settlement, discharge and satisfaction of Bunge and Klein of and from any and all claims or causes of action asserted by him against Bunge and Klein in the Harbor Tank action. This stipulation shall not release, settle, compromise, discharge or satisfy any rights or claims of the Haupt Trustee against persons other than the released parties and on the terms hereof."

A release was also executed by the Trustee releasing Bunge and Klein "from any and all claims asserted by him in the Harbor Tank [New Jersey] action."

On December 10, 1973, the Trustee applied to the Bankruptcy Court for authorization to compromise and settle the New Jersey Action. The Application--from which Bunge and Klein also selectively quote--states in pertinent part:

> "3. In substance, the [New Jersey] action seeks to recover damages from Bunge and Klein, the latter being the President of Bunge, in the sum of $4,017,500, representing moneys Haupt had advanced to Allied, the repayment of which was allegedly secured by warehouse receipts.

The warehouse receipts involved were issued by Harbor Tank Storage Company, Inc. ("Harbor Tank"). As set forth in the complaint, it is contended that but for the concealment by Bunge and its Chief Executive Officer of the fraudulent activities of Allied relative to the issuance of warehouse receipts by Harbor Tank and other criminal activities of Allied and Mr. DeAngelis, Haupt would not have sustained the damages set forth in the complaint.

"7. Bunge and Klein have denied any and all liability to Haupt in connection with the Harbor Tank warehouse receipts. The defendants have denied all of the material allegations of the compaint. A copy of the pending answer is annexed hereto as Exhibit "C".

"8 Annexed hereto as Exhibit "D" is the brief of applicant as submitted to the Superior Court of the State of New Jersey, in anticipation of the forthcoming trial of the Bunge action. Exhibit "E" is a copy of the brief of the defendants. Said Exhibits illustrate the legal and factual issues in dispute in relation to the pending controversy.

"9. Applicant's claim against Bunge and Klein is predicated on the following legal theories: (a) prima facie tort, in that the defendants intentionally injured Haupt without justification; (b) fraud, in that defendants actively concealed the fraudulent activities of Allied; (c) violation by defendants of statutory obligations under the laws of the United States and New Jersey in respect of the concealment of the commission of a felony; (d) general tort liability on the basis of foreseeable harm resulting from conduct purposively corrupt by conventional standards, conduct intentional as to consequences or conduct utilizing vicious means as determined by conventional standards; (e) failure to perform in light of a duty to act imposed with the knowledge of peculiar conditions which created a high degree of risk to others; (f) intentional tort; and (g) wanton misconduct on the part of Bunge and Klein reflecting a conscious indifference to the consequences of their actions which would probably result in injury and harm to others.

"10. As reflected by the annexed Exhibits "D" and "E", Bunge and Klein sharply dispute applicant's contentions and allegations of fact. It is contended by the defendants that Bunge was defrauded by Allied and Mr. DeAngelis. Defendants challenge the credibility of Mr. DeAngelis and other witnesses. It is asserted that Bunge and Klein are innocent victims of the Salad Oil Scandal.

"11. The contentions of Bunge and Klein further assert that any loss suffered by Haupt was caused by the 'wanton and reckless negligence, dishonesty, fraud or criminality of Haupt's partners and employees'. It is submitted on behalf of the defendants that Haupt was guilty of misconduct and contributory negligence and, therefore applicant is precluded from any recovery.

"12. Defendants further contend that Haupt was a mere 'conduit' and that its only interest in the transactions involved was as a means to allow financial institutions to lend money to Allied. Thus, it is submitted that "Haupt put up no money of its own, and willingly turn over the securities represented by the warehouse receipts to the banks, who were the real parties in interest to the transaction.

"13. Defendants also deny the existence of any duty on their part to Haupt, either at common law or pursuant to any applicable statute. Defendants note that Haupt's relationship with Allied arose subsequent to the so-called Harbor Tank Incident.

"14. Defendants have interposed a panoply of defenses as well as arguments of estoppel based upon applicant's contentions in the action instituted by him against The Fidelity and Casualty Company of New York. It is unnecessary for the purposes of this application to elaborate at length upon the various contentions and defenses. It is self-evident that the pending action presents sharply disputed issues of fact and law. Many of the questions which would be presented to the Court are matters of novel impression."

Approval for the settlement was given by the Bankruptcy Court.

As is clear from the brief history given above, it was always understood by the Trustee, Bunge and Klein that the Trustee's cause of action asserted in the New Jersey action was based upon a tort. It was also understood that the causes of action asserted in the instant proceeding are separate and distinct from the tort cause of action. Thus, the doctrine of res judicata is not here applicable. Lawlor v. National Screen Services Corp., supra. Nor has there been a splitting of a cause of action. Dempsey v. D.B & M. Oil & Gas Co., 112 F. Supp. 408, 412-413 (E.D. Ken. 1953).

The courts have consistently held that where, as here, one wrongful act is the subject of two or more separate and distinct causes of action that evidence relating to the wrongful act is admissible to support both causes of action even if one cause of action had already been judicially determined. See, e.g., Woodbury v. Porter, supra. Household Goods Carriers' Bureau v. Terrel, supra and cases cited therein.

The rule is best illustrated in the Terrel* case, a case squarely on point. There the defense raised sought to

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* The Terrel case specifically distinguishes Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 30 (5th Cir. 1961), relied upon by Bunge and Klein, because that case "held that res judicata barred plaintiffs from bringing a second suit based on the same 'cause of action' as an earlier suit." 452 F.2d at 157, note 11. Bunge and Klein's other cases are distinguishable for the same reason.

exclude certain evidence on the basis of the doctrine of res judicata. Prior to that action, the plaintiff had commenced an action based upon a tort (libel) which was ultimately settled. Plaintiff brought the second action asserting violation of the anti-trust laws. At the trial of the anti-trust action, plaintiff sought to introduce as evidence the letter which gave rise to the libel. The Fifth Circuit disposing of the defendant's argument that evidence should have been excluded on the grounds of res judicata stated:

> "At trial and on the original appeal, appellants took the position that the Wyche letter was inadmissible in its entirety because it had been the subject of litigation in the previously settled libel suit and, therefore, under the doctrine of res judicata, was not a proper subject of litigation in a second suit. We cannot accept this contention. The majority of the original panel concluded that subject to the limitations mentioned in the opinion, the letter was indeed admissible in evidence in the antitrust suit. Moreover, it is well established that in a proper case one wrongful act may be the subject of two or more separate and distinct causes of action. In the instant case, for example, the letter plainly represented the invasion of two separate and distinct primary rights, the one a personal right not to be subjected to libelous statements, and the other a business right to enter competition freely. Thus, we conclude that the letter and its libelous nature were properly admitted to show an intention or a scheme to restrain trade, the prior libel suit notwithstanding. Id. at 157.

Since this action involves different causes of action from that asserted in the New Jersey action, it is clear that res judicata and splitting a cause of action are doctrines not here applicable.

CONCLUSION

For all the foregoing reasons, Bunge and Klein's motion should be denied in its entirety.

Respectfully submitted,

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Plaintiff's Memorandum in Opposition to Motions for a Directed Verdict

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt,	:	
Plaintiff,	:	
-against-	:	66 Civ. 1016 (RLC)
NEW YORK PRODUCE EXCHANGE, et al.,	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE DEFENDANTS' MOTIONS FOR A DIRECTED VERDICT

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
POINT I - PRIOR TO NOVEMBER 14, 1963, THE NEW YORK PRODUCE EXCHANGE AND THE DEFENDANT MEMBERS OF ITS BOARD OF MANAGERS FAILED TO REGULATE PROPERLY THE COTTONSEED OIL FUTURES MARKET ON THE EXCHANGE	5
A. At all times during 1963 and prior to November 14, DeAngelis and Allied were manipulating prices on the Exchange and creating other unhealthy market conditions	7
B. Prior to November 14, 1963, the Allied price manipulation was manifest in various market indicators which served as warning signs that unusual activity was occurring on the New York Produce Exchange	17
1. Volume of Trading	18
2. Size of Open Interest	18
3. Distribution of Oper Interest	18
4. Contracts Settled by Delivery After First Notice Day	19
5. Ex-Pit Transactions	20
C. Information concerning market indicators manifesting these warning signs, was readily available to the Members of the Board of Managers of the New York Produce Exchange during 1963	22

		Page
D.	Prior to November 14, 1963, the defendant members of the Board and the Exchange itself were, at minimum, either negligent or reckless in disregarding market indicators manifesting a price manipulation and a disorderly market on the Exchange.....	25
	1. Donald V. MacDonald.....	25
	2. Sidney Fashena.....	27
	3. Harry B. Anderson.....	29
	4. Walter C. Klein.....	31
	5. Harold H. Vogel.....	32
E.	Had the Board investigated unusual market conditions at the beginning of August 1963, it would have discovered, among other things, the ongoing manipulation by DiAngelis and Allied and the unhealthy concentration on the long side of of the market in the hands of Ralph Peters and Allied.....	34
F.	Although charged with a duty to investigate, the defendants in 1963 took no meaningful action in behalf of the Exchange	40
G.	Members of the Board of the Exchange in 1963 had both a statutory and a fiduciary duty to be aware of conditions affecting the market which they were charged to regulate.....	45

Page

POINT II - PRIOR TO NOVEMBER 14, 1963 THE DEFENDANTS, IN BAD FAITH, FAILED TO REGULATE THE EXCHANGE 51

A. All of the defendants profited from the Activities of Allied and DeAngelis prior to November 14, 1963 52

B. Bunge, Continental, Merrill and their respective Exchange representatives either knew or must have known that Allied was engaging in ex-pit activities giving rise to a price manipulation during 1963.... 54

C. Bunge and Continental, prior to and during 1963, received huge profits, and interest payments in their dealings with Allied..... 60

POINT III - THE FAILURE TO SUSPEND TRADING ON NOVEMBER 14, 1963 AND THE SUBSEQUENT DELAY TO NOVEMBER 19, REPRESENTED A WILLFUL, RECKLESS, GROSSLY NEGLIGENT OR BAD FAITH FAILURE TO REGULATE THE EXCHANGE..... 64

A. The events of November 13-20, 1963 64

B. During the November 13-20 period, defendant members of the Board were grossly negligent or reckless in their disregard of their duty to regulate the market 69

1. Donald V. MacDonald..... 69

2. Sidney Fashena..... 71

Page

3. Harry B. Anderson..... 72

4. Walter C. Klein..... 73

5. Harold H. Vogel..... 73

C. On and after November 13, 1963 defendant members of the Board acted in bad faith in failing properly to regulate the market..... 74

1. Donald V. MacDonald..... 74

2. Harry B. Anderson..... 75

3. Walter C. Klein..... 76

4. Harold H. Vogel..... 77

POINT IV - THE DEFENDANT FIRMS AND THE EXCHANGE ARE LIABLE FOR THE ACTS OR OMISSIONS OF THEIR RESPECTIVE REPRESENTATIVES WHO SERVED ON THE BOARD OF THE EXCHANGE..... 79

A. The Liability of the New York Produce Exchange..... 79

B. Defendants Bunge, Usiskin, Continental and Merrill Lynch, as a matter of law, are liable for the action or inaction of their representatives on the New York Produce Exchange during 1963..... 79

1. The guarantee given by Continental, Bunge and Merrill Lynch..... 80

2341

Page

2. The acts of the individual defendants as members of the Board of the Exchange in 1963 are, in any event, attributable to their respective firms..... 81

POINT V - DEFENDANTS' BAD FAITH FAILURE TO REGULATE THE EXCHANGE VIOLATED THE ANTITRUST LAWS..... 86

CONCLUSION..... 92

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARVEY R. MILLER, as Trustee in Bankruptcy of IRA HAUPT & CO., a Limited Partnership, Bankrupt,

Plaintiff,

-against-

NEW YORK PRODUCE EXCHANGE, et al.,

Defendants.

66 Civ. 1016 (RLC)

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE DEFENDANTS' MOTIONS FOR A DIRECTED VERDICT

Preliminary Statement

This memorandum is submitted in opposition to the motions for a directed verdict made by defendants herein pursuant to Rule 50(a) of the Federal Rules of Civil Procedure.

Plaintiff respectfully submits that the evidence presented by plaintiff on plaintiff's direct case establishes

that defendants failed to regulate the New York Produce Exchange (the "Exchange") during 1963; that defendants' failure constituted either reckless or bad faith disregard of fiduciary and statutory duties imposed upon the Exchange and the defendant members of its Board of Managers; that the bad faith failure of certain defendants has made these defendants subject to the purview and the penalties of the antitrust laws; and that the foregoing failure of the individual defendants to regulate the Exchange during 1963 is attributable both to the Exchange itself and to the respective corporations or partnerships employing the individual defendants during 1963.

Defendants' motions for directed verdicts ignore the clear standards which are to be applied upon such motions. The United States Supreme Court has stated that only "when the evidence is such that without weighing the credibility of the witness there can be but one reasonable conclusion as to the verdict" should a verdict be directed. Brady v. Southern Ry. Co., 320 U.S. 476, 479 (1943); accord, Bigelow v. Agway, Inc., 506 F.2d 551 (2d Cir. 1974); Armstrong v. Commerce Tankers Corp., 423 F.2d 957 (2d Cir. 1970), cert. denied, 400 U.S. 833 (1971).

In making this determination, the Court must view the evidence in the light most favorable to the non-movant

and must give the non-movant "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." Continental Ore Co. v. Union Carbide Corp., 370 U.S 69[illegible] 696 (1962); Bigelow v. Agway, Inc., supra; O'Connor v. Pennsylvania R.R. Co., 308 F.2d 911 (1962).

In this Circuit the question of the scope of review of the evidence is settled. The Second Circuit rule is that the court must consider all evidence in support of the non-movant's position and "evidence unfavorable to it may be considered only if that evidence stands uncontradicted and unimpeached." Bigelow v. Agway, Inc., 506 F.2d 551, 554 (2d Cir. 1974); accord, Simblest v. Maynard, 427 F.2d 1, 5 (2d Cir. 1970). The Court should not view as uncontradicted and unimpeached, that evidence properly the subject of defendant's direct case which plaintiff has not had the opportunity to rebut. E.g., Continental Ore Co., v. Union Carbide Corp., supra; Bigelow v. Agway, Inc., supra; O'Connor v. Pennsylvania R.R. Co., supra.*

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* At this stage of the proceeding plaintiff would call to the Court's attention that the Court has on several occasions allowed the scope of cross-examination to go beyond that of plaintiff's direct examination in an effort to expedite the trial and avoid unnecessary inconvenience to several witnesses.

(cont.)

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Thus, the defendants have been allowed to go beyond the scope of direct in their readings of the depositions of Messrs. Preston and Berg. In the interest of avoiding the necessity of recalling defendants Anderson, Klein and Vogel, the Court has also permitted the scope of their cross-examination to be expanded. Plaintiff asserts that much of this evidence, particularly evidence directed at proving Haupt's misconduct, should have been brought out in defendants' direct case. Defendants claim that there is uncontradicted evidence on the record that should be considered on their motions to dismiss.. However, to the extent that there is any such uncontradicted or unimpeached evidence of an unfavorable nature to plaintiff, it is a matter of record as a result of the judicious effort of the Court to expedite the overall trial, supplemented by the virtually complete control over these witnesses exercised by the defendants. It is and has been plaintiff's intention to contradict and/or impeach this evidence in its rebuttal case. Plaintiff therefore contends that it would be improper and manifestly unfair for the Court at this time to view this evidence as uncontradicted and unimpeached.

It is, therefore, respectfully submitted that the Court should give the plaintiff the benefit of all reasonable inferences from the evidence, and may only consider unfavorable evidence which is both uncontradicted and unimpeached and within the scope of the plaintiff's direct case.

POINT I

PRIOR TO NOVEMBER 14, 1963, THE NEW YORK PRODUCE EXCHANGE AND THE DEFENDANT MEMBERS OF ITS BOARD OF MANAGERS FAILED TO REGULATE PROPERLY THE COTTONSEED OIL FUTURES MARKET ON THE EXCHANGE

During 1963, the New York Produce Exchange ("Exchange" or "Produce Exchange") and the defendant members of its Board of Managers failed to regulate the Exchange in a manner which promoted fair practice and honest dealing and prevented the occurrence of a disorderly market and a manipulation of prices on the Exchange. The defendants' failure to regulate was, at least in part, reflected in their failure (1) to keep informed with respect to pertinent market conditions; (2) to investigate, or to cause an investigation to be made, when warning signs of questionable or unusual market behavior came to their attention, or reasonably should have come to their attention in the performance of their duties as managers; (3) to act, or to direct that meaningful regulatory action be taken to prevent an actual price manipulation and a clear threat of a disorderly market; (4) to avoid conflicts of interest and (5) to refrain from realizing or attempting to realize pecuniary gain for themselves or their respective employers at the expense of those who

traded on the Produce Exchange, all in contravention of their regulatory responsibilities. See, Harman v. Willbern, 374 F.Supp. 1149 (D.Kan. 1974).

A. At all times during 1963 and prior to November 14, DeAngelis and Allied were manipulating prices on the Exchange and creating other unhealthy market conditions

At all times during 1963 and prior to November 14 of that year, Allied Crude Vegetable Oil Refining Corp. ("Allied" or "Allied Crude") and its president, Anthony DeAngelis, were engaged in a manipulation of prices of cottonseed oil futures contracts traded on the Exchange. (DeAngelis, Tr. pp. 2792-2797, 2882; Gittleman, Tr. pp. 3076-7; Gray, Tr. p. 4351)* This price manipulation carried with it a distinct threat to orderly marketing conditions and the integrity of contracts traded on the Exchange (Gray, Tr. pp. 4395-7) and a consequent threat of a squeeze in the near contract month during and after July, 1963.

Plaintiff has presented expert testimony that a price manipulation involves the taking or holding of futures prices to an artificial level by deliberate action. (Gray, Tr. p. 4345). Expert testimony further has defined a disorderly market as one in which futures trading does not proceed in a manner reflecting the steady flow of supply and demand.

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* All references to testimony herein are made to the trial transcript in this action and will be designated "Tr., p. ." All references to witnesses will be to the last name of the witness.

(Gray, Tr. p. 4345). And futures contracts which are held for a manipulative purpose or acquired in an illegal manner lack integrity. (Gray, Tr. p. 4346)

Mr. DeAngelis accomplished the foregoing through a series of steps and transactions that included a) buying large numbers of futures contracts in a general effort to support and sustain prices; (DeAngelis, Tr. pp. 2792-2797, 2957; Gray, Tr. pp. 4394-6, 4400); b) placing buy orders at or near the market close, at the end of a trading day, specifically to support and sustain market prices (Gittleman, Tr. pp. 3706, 3704; Fontana, Tr. pp. 1087, 1088; Gray, Tr. pp. 4399-4400); and c) a scheme to sustain market prices and avoid selling the long futures position which Mr. DeAngelis had accumulated. Mr. DeAngelis would do this by stopping registered warehouse receipts tendered for delivery and paying for these receipts, which he could not otherwise afford, by pledging them to others in a series of loan transactions consummated as part of ex-pit trades. (DeAngelis, Tr. pp. 2822-2824, 3029; Gittleman, Tr. pp. 3082-3084; Gray, Tr. p. 4360).

These ex-pit transactions took the following form and had the following effect:

1. DeAngelis first accumulated an inventory of registered warehouse receipts by standing for delivery

in an attempt to support market prices. (DeAngelis, Tr. pp. 2815-2819; See Gray, Tr. pp. 4395-6). Since DeAngelis neither could afford to buy these receipts nor did he have contractual commitments for the oil represented thereby, this practice was not economically sound. Rather, it was intended for the purpose of avoiding a sale of Allied's near month long position, with the consequent drop in market prices. (DeAngelis, Tr. pp. 2815-2819).

2. As Allied entered the delivery period for a contract month, early deliveries would lead to a retendering of large numbers of delivery notices, and a consequent price depression. (Gray, Tr. p. 4440). In order to prevent futures prices from falling Allied either would have to stand for delivery or constrict the deliverable supply of oil. Allied accomplished the latter by taking the inventory of registered warehouse receipts off the market (i.e., by placing it in the hands of lenders, as loan collateral). (Gray, Tr. pp. 4389-90). Any other action by Allied, including an actual sale of the registered oil, would have depressed cottonseed oil futures prices. (Gray, Tr. p. 4391; DeAngelis, Tr. p. 2817; Gittleman, Tr. p. 3083).

3. DeAngelis arranged for loans to be made to Allied in the guise of a sale of registered warehouse receipts by Allied to a lender such as Bunge Corporation ("Bunge"). (DeAngelis, Tr. pp. 2839, 2840). Allied had a similar arrangement with Continental Grain Company ("Continental") (DeAngelis, Tr., p. 2780). It was not intended that the ownership of this cash oil represented by the "sale" of registered warehouse receipts in these transactions would actually change hands. (Gray, Tr.p. 4385).

4. DeAngelis insured his lenders against risk of loss by engaging in a charade taking the form of an ex-pit sale of registered warehouse receipt loan collateral to his lenders. In such a transaction, both DeAngelis and the lender would report the ex-pit sale to the Exchange as involving an actual change of ownership of cash oil. These ex-pit trades insured that DeAngelis' lenders could be fully hedged against risk of loss due to fluctuation in the value of the registered warehouse receipt collateral (DeAngelis, Tr. pp. 2833, 2844; Gittleman, Tr. pp. 3082-3). The purpose and effect of these ex-pit transactions was not to transfer ownership of the registered warehouse receipts. (Gray, Tr. pp. 4388, 4393).

5. Pursuant to a pre-arranged understanding (denied by defendants but supported fully by the pattern of these ex-pits) (see Gittleman, Tr. p. 3084, 3085, 3091-3094; see also Gray, Tr. pp. 4385, 4387), Allied would engage in a subsequent ex-pit transaction prior to the delivery date of the futures contract involved in the original ex-pit. In this second transaction, the warehouse receipt collateral would make a "round-trip" back to Allied. This would happen when Allied "bought back" the collateral and sold offsetting futures contracts to its lenders to undo the ex-pit hedge set up in the original transaction, (DeAngelis, Tr. pp. 2822, 2823, 3052; Gittleman, Tr. pp. 3084, 3085, 3091-3094, 3100).

6. On a number of occasions, Allied would not have sufficient funds to repay ex-pit loans when they came due. In some instances, Allied would either pledge the warehouse receipts to another exporter who would pay the previous lender (Exs. 234-5 in evidence)* and take over the receipts accompanied by a new ex-pit trade in a more distant month (DeAngelis, Tr. p. 2818-2821, 2823), or Allied would simply "roll-over" the loan with the same lender in a further series of ex-pit transactions. Thus, for example, if Allied could not repay an ex-pit

* All references to plaintiff's exhibits in evidence in this action will be designated "Ex. in evidence."

loan, secured by 500 registered warehouse receipts, prior to the delivery period of the futures contracts involved on the original ex-pit loan agreement, Allied would take the following steps:

a) Allied would engage in a "round-trip" transaction as described above;

b) simultaneously, Allied and the lender would engage in a second ex-pit transaction designed to return the loan collateral to the lender and extend the date of repayment of Allied's loan.

(DeAngelis, Tr. pp. 2864-2866, 2869, 2870; Gittleman, Tr. pp. 3084, 3085, 3091-3094, 3100).

7. The effect of such "roll-over" transactions, inter alia, was to create a churning effect on trading volume (e.g., 500 contracts involved in two ex-pit transactions comprising a roll-over would be reported as trades involving 1,000 futures contracts and equivalent amounts of cash oil. In fact, however, no cash

oil would actually change hands, and an artificial picture of market activity and market interest would be created.)

8. The ex-pit loan arrangement which allowed Allied to stand for delivery of registered oil without having independent financial resources to pay for this oil enabled Allied to continue to stand for increasing numbers of deliveries as part of this price support scheme.

(See generally, Gray, Tr., pp. 4351-4671).

Not only were DeAngelis and Allied engaging in an actual price manipulation on the cottonseed oil futures market during 1963, but the huge concentration on the long side of the market built up by DeAngelis in his effort to sustain prices was, in and of itself, a danger to orderly marketing. (Gray, Tr. p. 4401; plaintiff's Exhibit 133 in evidence, a chart summarizing the percentage of the total open interest on the New York Produce Exchange held by Allied).

Concentration of such a large position in the hands of one interest is dangerous in and of itself, for the actions taken by that one person can definitely impact on price. Moreover, the financial stability of the market

becomes increasingly dependent on stability of a single interest (Gray, Tr. pp. 4401-02) and that is exacerbated when that interest is speculating rather than hedging. In fact, Mr. DeAngelis has testified that Allied was not a hedge, but was speculating during this period (DeAngelis, Tr. p. 2796). This danger carried with it both the potential for a squeeze in the near contract month, since at least July 15, 1963 (Ex. 133 in evidence) and the threat of collapse of the cottonseed oil futures market -- a threat that was realized in November of 1963. The build-up of position by DeAngelis finally culminated on November 14 when he held 5428 of the 5533 long December contracts (Ex. 1 in evidence). At the same time, when there were only 3,200 registered warehouse receipts outstanding (Ex. 249 in evidence) Allied owned at least 2500 of them (Ex. 41 in evidence; Gittleman, Tr. p. 3104).

Based upon the foregoing, it is evident that Allied possessed the distinct potential to squeeze the market as the delivery period on the near month contract approached. In light of the size of DeAngelis' December futures position and the number of registered warehouse receipts which he then owned, it became readily apparent that the shorts would have to pay a premium to cover their position

if Allied chose to stand for delivery. Time and costs were coming together in such a manner that the shorts could not arrange a) to determine whether there was sufficient unused licensed warehouse capacity; b) alternatively, to secure licenses for additional warehouse space; c) to refine cottonseed oil to meet the specifications of the futures contract traded on the Exchange; d) to ship oil to a licensed warehouse where the oil would then be in deliverable position; and e) to take all of the foregoing steps at a cost that would alleviate the need to avail themselves of the less cumbersome alternative: taking an offsetting long position at a premium otherwise unjustified by the normal flow of supply and demand. (DeAngelis, Tr. pp. 2911-2912). This situation posed the essence of market congestion. (See Findings, Order of Secretary of Agriculture Under Section 5a(4) of the Commodity Exchange Act Hearing Docket, C.E.A. No. 2). Here, plainly, was the threat of, and the potential for, a squeeze in the near month.

On November 19, however, when DeAngelis decided to give up his scheme and declare bankruptcy (DeAngelis, Tr. pp. 2887-2889) the house of cards sustained by the Allied price manipulation collapsed, and along with it the cottonseed oil futures market on the Exchange.

All of the foregoing represent conditions which the New York Produce Exchange, its officers and its Board of Managers were charged with preventing during 1963, 7 U.S.C. §7(d); Exchange By-Laws, Section 67, 67a, 68; (Ex. 55 in evidence); Exchange Cottonseed Oil Trading Rules 3, 4, 5 (Ex. 56 in evidence).

B. Prior to November 14, 1963, the Allied price manipulation was manifest in various market indicators which served as warning signs that unusual activity was occurring on the New York Produce Exchange

The Allied price manipulation and related activity manifested itself in various warning signs. The testimony adduced during the course of the trial supports plaintiff's contention that certain market indicators clearly presented warning signs which should have triggered a duty, owed by the members of the Board of Managers of the Exchange, to investigate the unusual conditions prevailing on the cottonseed oil futures market (Dahl, Tr. pp. 726-27, 730-31, 733-34, 790-92). An investigation of ex-pit trades should have been made from May, 1963 forward (Gray, Tr. p. 4428); and a general investigation should have occurred no later than early August, 1963. (Gray, Tr. p. 4445)

The testimony further demonstrates, at minimum, that the key members of the Board, who comprised its Executive Committee, either a) observed such market indicators, but acted in reckless disregard of these indicators in failing to carry out their regulatory duties; or b) were so grossly negligent that they never learned of these warning signs.

In brief, the pertinent market indicators supported the following observations which should have been made during 1963:

1. Volume of trading

During 1963, volume of trading on the Exchange had increased substantially in comparison to prior years. The sharp increase in trading activity was particularly noticeable during the summer months of 1963. (Ex. 122 in evidence). In 1963, there was an unusual increase in volume of trading which resulted from 35,000 ex-pit trades reported as Type 6-B trades (Dahl, Tr., pp. 782, 784).*

2. Size of Open Interest

As in the case of trading volume, the open interest had increased in size during 1963. During the months of June, July and August, the size of open interest was substantially higher that it had been during the prior three years (Ex. 123 in evidence). Increasing open interest in light of a reported 35,000 Type 6-B ex-pit transactions during 1963 was unusual (Dahl Tr., pp. 783-84).

3. Distribution of Open Interest

Between the months of March and July of 1963,

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* Transactions reported pursuant to Rule 6(a) of the cottonseed oil futures contract trading rules as office transfers were not included in the trading volume figures contained in plaintiff's Ex. 122 in evidence.

there was a sharp increase in the size of the open position on the long side of the cottonseed oil futures market in the hands of large hedgers. (Dahl Tr., pp. 785-87) This fact was observable in reading the month-end publication on this subject issued by the CEA (Pl. Ex. 10 [e] and [g] in evidence). In particular, from this information it could readily be determined that the percentage of the open interest in the hands of large hedgers had increased from approximately 10% at the end of March to 70% at the end of July, 1963 (Gray, Tr. p. 4425; Ex. 10 [c] and 10 [g] in evidence). This constituted a signal to the Board, in regularly published data, that should have alerted the Board to the need for further investigation. (Gray, Tr. p. 4425)

4. Contracts Settled by Delivery After First Notice Day

There was a marked increase in the number of contracts settled by delivery after first notice day during 1963. Traditionally, futures contracts are terminated when a trader takes an off-setting position in the futures market. Thus, a trader with a long cottonseed oil futures position generally closes out his position by purchasing off-setting short futures contracts.

By the end of July, 1963, trading in cottonseed oil futures contracts for the March and May contract month had long since been completed. There was a sharp increase in the number of contracts, open on the first notice day of the March and May contract months, which were settled by delivery as compared to those contract months during 1962. In fact, the number of contracts settled by deliveries during this period in 1963 was more than double 1962. (Dahl Tr., pp. 787-788; Ex. 125 in evidence). Increased deliveries taking place on the Exchange during 1963 presented a signal of something amiss or unusual taking place (Gray, Tr. p. 4440). Further the pattern of deliveries, occurring early in the delivery period, were indicative of price weakness in the market and should have been followed by price decline in the normal course unless a trader was standing for deliveries to support prices (See Gray, Tr. pp. 4440-4442).

5. Ex-Pit Transactions

During 1963, the numbers of futures contracts traded or transferred as part of ex-pit transactions were astronomically high relative to previous years (Dahl Tr., pp. 730-31; 788-89). During 1961 a total of 504 contracts were reported as Type 6-B ex-pit trades; during 1962, 434

contracts; during 1963, 35,438 contracts were reported as subject to Type 6-B ex-pit trades (Dahl Tr. pp. 788-89; Ex. 126 in evidence). The number of contracts traded ex-pit during 1963 were unprecedented in the context of the prior two years (Gray, Tr. p. 4428).

The foregoing figures are to be contrasted with the basic manner in which trading takes place on futures markets. Futures markets are auction markets, that is, trading takes place in a trading pit where brokers come toegther to buy or sell contracts in behalf of their customers. In 1963 on the New York Product Exchange ex-pit trades were allowed on a limited basis as an exception to the general rule that trading takes place in the pit (Leuthold Tr. pp. 245-246). Professor Gray has testified that from May forward there was a sufficient quantity of ex-pit trading on the Exchange to require an investigation (Gray, Tr. p. 4428).

C. Information, concerning market indicators manifesting these warning signs, was readily available to the Members of the Board of Managers of the New York Produce Exchange during 1963

During 1963, the New York Produce Exchange maintained records of the volume of trading on the Exchange. (Berg, Tr. p. 2008). In addition, trading volume was reported to the Commodity Exchange Authority which published daily, weekly and monthly trading volume reports. (Dahl, Tr. pp. 550, 772). Information relating to size of open interest was recorded and disseminated in the identical manner as was data relating to trading volume. (Dahl, Tr. p. 550). During 1963, it was customary for futures exchanges, including the New York Produce Exchange to receive such information (Dahl, Tr. p. 724).

During 1963, the Commodity Exchange Authority regularly published a report setting forth the commitments of traders in cottonseed oil futures contracts at month-end. This report stated the number of contracts in the hands of various categories of traders on both the long and short side of the market. Those categories included large hedgers (25 or more contracts); large speculators (25 or more contracts);

and small traders. (Exs. 10[c] and [g] in evidence). During 1963, it was customary for Exchanges, including the New York Produce Exchange, to receive these reports (Dahl Tr., p. 724).

When contracts were settled by delivery during 1963, this information was posted on the trading floor of the Produce Exchange (Dahl, Tr. p. 568). In addition, the Production Exchange maintained records of the number of contracts settled by delivery (Berg, Tr. p. 2071).

During and prior to 1963, all ex-pit transactions had to be reported to the New York Produce Exchange. In fact, the brokerage firms representing customers engaging in either side of an ex-pit transaction were required to forward letters reporting all such ex-pit transactions (Ex. 56 in evidence [Rule 6 of the Cottonseed Oil Trading Rules]). During 1961, 1962 and 1963 records of ex-pit transactions were maintained by the New York Produce Exchange. Indeed, it was based upon such records, produced by the Exchange in discovery prior to trial, that the accountant for the Trustee prepared plaintiff's Exhibit 126 in evidence. (Ellison, Tr. pp. 420-423; Ex. 126-a for identification). Further, it was customary for futures exchanges, including the New

York Produce Exchange to maintain records of deliveries and ex-pits (Dahl, Tr. pp. 724-725a); and to have such significant information regularly made available to Exchange officials (Gray, Tr. pp. 4405-06).

As the Produce Exchange itself maintained permanent records of both deliveries and ex-pit transactions, information relating to these market conditions was readily available to all members of the Board of Managers -- whether or not they ever set foot on the trading floor of the Exchange. This information was theirs for the asking.

In addition to all the foregoing sources of information, it was common knowledge, both in the trade and on the Exchange floor, that market indicators were up and that Allied was, in large part, at the bottom of this surge of market activity. (Fontana, Tr. See pp. 1080-1083).

D. Prior to November 14, 1963, the defendant members of the Board and the Exchange itself were, at minimum, either negligent or reckless in disregarding market indicators manifesting a price manipulation and a disorderly market on the Exchange

The individual defendants and other Exchange representatives have given testimony with respect to their knowledge of conditions prevailing on the cottonseed oil futures market during 1963; and the source of their respective knowledge. Each has testified that he had no material concern with market conditions which prevailed on the Exchange prior to November 14, 1963. Plaintiff contends that such lack of concern evidenced either a negligent or a reckless disregard of the duty of these men to regulate the Exchange based on an awareness of these market indicators.* Pertinent testimony of the respective defendants in this regard included the following:

1. Donald V. MacDonald.

Donald V. MacDonald, who was President of the Exchange, and a member of its Board of Managers and Executive Committee during 1963, has testified to the record volume of trading which occurred on the Exchange during 1963 (MacDonald

* Plaintiff also contends that all defendants, with the possible exception of Fashena and Usiskin, failed to regulate in good faith prior to November 14, 1963 (Point II, infra). A number of the defendants, including Anderson and Klein, had actual knowledge of the facts giving rise to Allied's price manipulation.

Tr., pp. 1497-98). Each day during 1963, Mr. MacDonald read the size of open interest statistics published by the Commodity Exchange Authority ("CEA") (MacDonald, Tr. p. 1504). The Exchange President has acknowledged that he personally observed a sharp increase in the size of the open interest from at least the middle of September until November 14, 1963 (MacDonald, Tr. p. 1465).

Mr. MacDonald also was on the mailing list of those receiving the month-end report published by the CEA on commitments of traders. He has testified that he followed these reports during the year (MacDonald, Tr. pp. 1534, 1536). Mr. MacDonald has also testified that he was aware that there was an increasing number of deliveries on the Exchange in satisfaction of futures contracts, prior to November 14, 1963 (MacDonald, Tr. p. 1558).

Further, with respect to ex-pit trades, Mr. MacDonald has not only testified as to his general awareness of such trades; but more specifically, that the growth in the size of the open interest from July to October 1963 resulted primarily from the heavy volume of ex-pit trades (MacDonald, Tr. p. 1506). Indeed the Exchange President has testified that if one subtracted out the contracts subject to ex-pit trades reported pursuant to Rule 6(b) of the Cottonseed Oil Futures Trading Rules (Ex. 56 in evidence), the volume of

trading during 1963 would not have been unusual. (MacDonald, Tr. pp. 1501-1502).

In addition, during the month of August 1963, the President of the New York Produce Exchange Clearing Association ("Clearing Association"), Mr. Solomon J. Weinstein, issued a written warning to the Exchange and to Mr. MacDonald that there was an unhealthy concentration of the open interest in the hands of a few clearing members; and further that, in essence, ex-pit transactions prior to August 16, 1963 presented a substantial ground for concern (Ex. 27, 28 in evidence).*

Despite the wealth of knowledge which he received by following the foregoing market indicators and the written warnings from the Clearing Association, Mr. MacDonald evidenced no material concern with market conditions on the Exchange prior to November 14, 1963.

2. Sidney Fashena.

Sidney Fashena, Treasurer of the Exchange and a member of its Board of Managers and Executive Committee,

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* Mr. MacDonald seeks to excuse the inaction of the Exchange during the balance of August 1963 by asserting that no one opened official mail addressed to the President of the Exchange in his absence through Labor Day. Late in September, Messrs. MacDonald, Fashena and Berg did attend a meeting with representatives of the Clearing Association. Mr. MacDonald's lack of concern with respect to the subject matter of this meeting is discussed in the subsection immediately following (D-2, infra).

knew during 1963 that both trading volume and the size of open interest had increased significantly in comparison to prior years. (Fashena, Tr. p. 2503). Mr. Fashena also was aware, during 1963, that there was a growing concentration in the open interest (Fashena, Tr. p. 2514). He knew that the number of contracts settled by delivery during 1963 was greater than it had been in 1962 (Fashena, Tr. p. 2513); and that there had been a signficantly greater number of ex-pit transactions in 1963 as compared to 1962 (Fashena, Tr. p. 2504). In fact, Mr. Fashena observed that ex-pits during 1963 involved a greater number of contracts, and occurred more frequently than he was accustomed to seeing (Fashena, Tr. p. 2506). He concluded from his observation of ex-pit trading, that the market was being used to obtain physical oil, and that this was an unusual situation (Fashena, Tr. pp. 2506-07).

In addition to the foregoing, Messrs. Fashena, MacDonald and Berg attended a joint meeting of officials of the Exchange and officials of the Clearing Association on September 23, 1963 to discuss, among other things, the need for Exchange action with respect to certain conditions on the Exchange (David L. Boyer, Tr. pp. 1190-1192; Ex. 27, 28 in evidence; Fashena, Tr. p. 2542-2544). Mr. Fashena testified that subsequent to the September 23 meeting,

neither he nor the Exchange nor any representative of the Exchange to his knowledge took any action with respect to the subject matter of that meeting. (Fashena, Tr. pp. 2546-48). The Exchange representatives relied entirely upon the scale-up margin action of the Clearing Association in lieu of any exercise of Exchange regulatory judgment.

3. Harry B. Anderson.

Harry B. Anderson, Acting President of the Exchange and a member of its Board and Executive Committee, was aware, during the summer of 1963, of both increasing trading volume and size of open interest. In addition, Mr. Anderson was aware of an increasing concentration of the open interest in November 1963 (Anderson, Tr. p. 3183). Mr. Anderson also recalled that deliveries were somewhat higher in 1963 than they had been earlier (Anderson, Tr. p. 3199); and that, during the summer of 1963, ex-pit trading was increasing (Anderson, Tr. p. 3184).

During 1963, Mr. Anderson was head of the Commodity Division of Merrill Lynch, Pierce, Fenner and Smith ("Merrill Lynch") and was responsible for providing commodity research information and advice to Merrill Lynch clients (Anderson, Tr. p. 3175). Mr. Anderson had at his disposal, and made use of, information concerning the markets in fats

and oils provided to him by the heads of various departments at Merrill Lynch, including the Commodity Research Department. (Anderson, Tr. p. 3182-84). The Merrill Lynch department heads who communicated with Mr. Anderson received information concerning the cottonseed oil futures market from brokers acting in behalf of Merrill Lynch on the trading floor of the Exchange (Anderson, Tr. pp. 3199-3200).

During 1963, Mr. Anderson knew that Allied was receiving ex-pit financing from Bunge, and Mr. Anderson understood the nature of this financing (Anderson, Tr. pp. 3170; 3195-97). On the one occasion that the Exchange did seek to question an ex-pit transaction during 1963 (a transaction which appeared to be a wash sale), Mr. Anderson did not seek to go behind the transaction with its customer, Bunge but, rather, engaged in a perfunctory inquiry which was purely cosmetic in nature (E.g., Anderson, Tr. p. 3284; Exs. 82 and 83 in evidence).

Despite the foregoing knowledge Mr. Anderson took no action as an Exchange regulator prior to November 14, 1963.*

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* Indeed, Mr. Anderson has testified, in essence, that the Business Conduct Committee, of which he was Chairman, had limited powers to act. (Anderson, Tr. pp. 3173, 3303-3304). In fact, pursuant to Section 61 of the By-Laws the Business Conduct Committee had far reaching powers to act. (Ex. 55 in evidence). During 1963, the Business Conduct Committee made use of none of this power to aid in regulating the market.

4. Walter C. Klein.

Walter C. Klein, President of defendant Bunge Corporation, was a member of both the Board of Managers and the Executive Committee of the Exchange during 1963. Not only did Mr. Klein's company engage in the trading of vegetable oils, both cash and futures, but Mr. Klein since 1958, was responsible fcr the supervision of the oil department of Bunge. (Klein, Tr. p. 3735)

Mr. Klein has testified that he was not personally aware, nor did he personally attempt to keep himself informed of market positions in cottonseed oil in 1963; that he relied completely on employees of Bunge to supply him with relevant information concerning market conditions in cottonseed oil; that he did not believe there were any unusual market conditions prevailing in cottonseed oil in 1963; and that he was apprised of and approved the ex-pit financing transactions between Bunge and Allied during 1963. (Klein Tr., pp. 3639-3640; 3642-3644).

Mr. Klein virtually has admitted his failure to exercise independent judgment as a regulator of the Exchange prior to November 14, 1963. He has testified that he did not know what the committees of the Exchange did; nor who

headed them. Indeed, he did not know the purpose, nor discuss the activity of, the Cottonseed Products Committee of the Exchange, of which Mr. Forti was a member (Klein, Tr. pp. 3636-3637). Despite his contention that he attended meetings whenever he was in town, Klein was forced to admit that he missed at least two meetings of the Board of Managers preceding November 14, 1963, even though he was in town at the time of these meetings (Klein, Tr. pp. 3638-3639). In any event, despite the knowledge which he did possess, Mr. Klein took no action as an Exchange regulator prior to November 14, 1963.

5. Harold H. Vogel.

Harold H. Vogel, Executive Vice President of Continental Grain Company ("Continental"), Vice President of the Exchange and a member of the Board and the Executive Committee of the Exchange, did not follow any of the market indicators which might have enabled him to fulfill his responsibilities as an Exchange regulator during 1963.

He was not familiar with the volume of trading; nor the size of the open interest; nor the distribution of the open interest; nor the number of contracts settled by

delivery; nor the number of contracts traded ex-pit. Nor did Mr. Vogel seek to keep himself apprised of such market indicators or conditions either by checking with other Exchange officials or by talking to persons at Continental familiar with the vegetable oil markets. (Vogel, Tr. p. 2924-29). Further, Mr. Vogel failed to attend three meetings of the Board of Managers between April and November 14, 1963 including the meeting of November 14, 1963. (Vogel, Tr. p. 3918).

Mr. Vogel, like Mr. Klein, in essence, was incapable of participating in market surveillance as an Exchange regulator since he chose to serve within an informational vacuum and cavalierly disregarded his obligation to attend meetings of the Board and to follow up on Exchange regulatory matters. Plaintiff respectfully submits that Mr. Vogel's failures in these respects amount to negligence per se. (See Section I-G, infra)

As pointed out in Section I-G, infra, Messrs. Klein and Vogel are charged with the knowledge they reasonably should have possessed or discovered in the discharge of their duties. Thus, they are deemed to have knowledge of all of the foregoing warning signs.

E. Had the Board investigated unusual market conditions at the beginning of August 1963, it would have discovered, among other things, the on-going price manipulation by Allied and DeAngelis and a healthy concentration on the long side of the market in the hands of Ralph Peters and Allied.

Plaintiff has presented expert testimony that the foregoing market indicators reflected unusual conditions on the Exchange during 1963; that such conditions should reasonably have given rise to concern among the Board of Managers; and should have moved the Board to conduct an investigation of these market conditions to determine whether these conditions were a reflection of a disorderly market or a market subject to price manipulation. (See generally testimony of Prof. Roger Gray) In fact, DeAngelis and Allied Crude were engaging in an on-going price manipulation of the cottonseed oil futures market during 1963. (See I-A, supra). The unhealthy concentration which also would have been discovered upon such an investigation was the result of the price manipulation in which Mr. DeAngelis and Allied Crude were engaged.

In the first instance, the price manipulation itself could have been discovered as early as May, 1963 had

the Exchange investigated the unprecedented volume of ex-pits; or, at minimum, enforced Rule 6-B as amended November 1, 1962 by requiring full documentation of the cash transaction involved in the ex-pit (Gray, Tr. p. 4429, 4446). Such documentation would have to include the names of the principals in the transaction, the price of the cash transaction, and the quantities involved. (Gray, Tr. pp. 4428-4429)*

Moreover, the substantial change in the distribution of open interest between March and July of 1963 should have led the Board of Managers of the Exchange to take appropriate action to determine whether there was an unhealthy concentration on the long side of the market in the hands of a few traders. (Gray, Tr. p. 4445) This information could have been obtained either from the CEA or, alternatively, in a series of steps beginning with the Clearing Association.

Had the Exchange conducted an investigation as described above during the month of August 1963, it would have learned that Ralph N. Peters & Co. ("Peters") was the most active clearing member on the long side of the market; and that Peters held a position in excess of 50% of the total open interest on the long side of the market (Gray,

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* Ironically, the one time it has been established that any documentation of the cash transaction involved in an ex-pit trade was submitted to the Exchange pursuant to Rule 6-B, it was submitted by Ira Haupt & Co. (Def't Ex. 204).

Tr. pp. 4449-4450). At that point, as Professor Gray has testified, the Exchange should have gone to Peters and found out who its customer was. They would then have learned that the customer was Allied; and that Allied held 90% of the long position in the near contract month and 80% of the long position in all contract months at that time (Gray, Tr. pp. 4450-4451; Ex. 133 in evidence).

In going to the Clearing Association, appropriate action would have included a request for information describing volume of trading and position of active clearing members. Thereafter, such an investigation would have included contacting such clearing members, learning the name or names of the customers for whom they held such a long position; and determining, either through the offices of the clearing member or through direct contact with the clearing member's customer, whether purchases reported as hedges were in fact hedges. Such a determination could be made by requesting the production of export sales contracts supporting the need for the substantial long position; and further, by a telephone call to the customer of the trader issuing the export sales contract in the event that the Exchange did not feel it had received adequate cooperation or information in

connection with its investigation. In the event that the Exchange determined that a position was not justified, it could direct the clearing broker -- who was a member of the Exchange -- to liquidate its customer's position (Gray, Tr. pp. 4445-4457).

Defendants have, as a constant refrain throughout the course of plaintiff's case, asserted the existence of a "doctrine of confidentiality" which precluded the Exchange from obtaining information relating to the position of clearing members or their customers. This, of course, is a distortion of an ordinary fact of life in the commodities business - that one businessman does not reveal his position to his competitor. In fact, however, expert testimony has clearly demonstrated that no such doctrine exists with respect to the need of an exchange or its board in connection with an exchange investigation. Indeed, without the ability to obtain such information, the exchanges would be unable to regulate themselves properly. (Gray, Tr. pp. 4429-31)*

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* Indeed, as both Messrs. DeAngelis and Gittleman have testified, early in 1963 the Chicago Board of Trade conducted just such an investigation of Allied's March 1963 soybean oil futures position. In connection with this investigation Allied--a non-member of the Board of Trade--was required to supply documented proof of its need to hedge in the March future. Allied's co-operation with this investigation is evidenced by Mr. Gittleman's letter to the board (Ex. 45e in evidence) revealing both Allied's cash and futures position to the Business Conduct Committee of the Board of Trade, and by providing copies of forward sales contracts obtained by Allied.

Further, Section 1.5 of the Regulations promulgated by the Secretary of Agriculture pursuant to the Commodity Exchange Act specifically provides that there shall be no prohibition precluding the CEA from disclosing facts or information regarding the business of any person subject to that Act when such disclosure is made, in good faith, to the Business Conduct Committee or other proper committee or official of a contract market on matters in respect to which such contract market has responsibility or duty under the Commodity Exchange Act.*

Finally, as a matter of fact, the alleged doctrine of confidentiality purportedly separating Exchange regulators from Clearing Association information has been debunked by the August 16, 1963 action of Clearing Association President Solomon J. Weinstein. At that time Mr. Weinstein issued written warning to the Exchange and its president both as to the unhealthy market concentration reflected on Clearing Association records and the Association's concern with ex-pit transactions (Exs. 27, 28 in evidence). Clearly the Clearing Association was inviting discussion; instead, the Exchange ignored this opportunity to perform a proper regulatory duty.

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* It is undisputed that the CEA gave such information to the Exchange on November 14, 1963 (Ex. 1 in evidence). Although there is some testimony that an earlier Exchange request was rebuffed (MacDonald, Tr.pp. 1520-1529) Berg says he never made a formal request to the CEA. (Berg, Tr. pp. 2061-2063).

Plaintiff contends that no meaningful investigation by or in behalf of the New York Produce Exchange ever took place during 1963. The Executive Committee, although possessing the pertinent powers of the Board when the full Board was not in session, did not meet prior to November 19, 1963. The Business Conduct Committee did not meet during the entire year. Had a meaningful investigation been made, plaintiff contends that the Exchange would have uncovered substantial evidence of an actual, ongoing price manipulation as well as a continuing threat to orderly marketing conditions presented by the huge concentration of the long position in the hands of one trader - Allied Crude.

F. Although charged with a duty to investigate, the defendants in 1963 took no meaningful action in behalf of the Exchange

During 1963, neither the New York Produce Exchange nor the individual defendant members of its Board and Executive Committee took any meaningful action pursuant to their respective duties under the Commodity Exchange Act and the By-Laws and Trading Rules of the Exchange.

Mr. MacDonald claims that Mr. Berg, Managing Director of the Exchange, at Mr. MacDonald's direction, requested information from the CEA regarding Allied's position in July, 1963, but was rebuffed (MacDonald, Tr. pp. 1520-22). However, Mr. Berg did not recall any formal request to the CEA regarding positions prior to November 13, 1963 (Berg, Tr. pp. 2061-63). Furthermore, when Messrs. Anderson, Klein and Forti met with Mr. Berg on November 13 to ask him to seek information from the CEA with respect to Allied's position, Mr. Berg did not make any mention of an alleged prior request or refusal (Anderson, Tr. p. 3222).

Mr. Berg purports to have made some semblance of an investigation of Haupt and Allied during 1963. Regarding Haupt, Mr. Berg met with Mr. Stevens of Haupt

2382a

during September, 1963 (Berg, Tr. p. 2118). However, Mr. Berg did not request, nor did he obtain, a single sheet of paper from Haupt regarding Allied's relationship with Haupt (Berg, Tr. p. 2158).

Regarding the Exchange's "investigation" of Allied, Mr. Berg met with Mr. DeAngelis in September, 1963 subsequent to his meeting with Mr. Stevens (Berg, Tr. pp. 2159-60). At this meeting, Mr. Berg did not obtain a single specific number from Mr. DeAngelis regarding the volume of Allied's ex-pits, the number of cottonseed and soybean oil futures contracts held by Allied, the amount of Allied's inventory, Allied's actual sales, the amount of business which Mr. DeAngelis anticipated, or Allied's historical volume of sales. At most, these topics were discussed in general terms (Berg, Tr. pp. 2131, 2148-55). Thus, Mr. Berg did not determine with any certainty either the size of Allied's position or whether such position was legitimate, i.e., hedged. Mr. Berg stated that he informed Mr. Anderson of his meeting with Mr. DeAngelis (Berg, Tr. p. 2161). However, Mr. Anderson has denied that he was ever informed of the meeting (Anderson, Tr. p. 3214). Mr. Berg claims he also probably informed Mr. Vogel of the meeting (Berg, Tr. pp. 2131-32).

As President of the Exchange, Mr. MacDonald had little, if any, knowledge of precisely what Mr. Berg was doing in these purported investigations. For instance, Mr. MacDonald presumed that Mr. Berg spoke to the managing partner of the entire Haupt firm because that would have been the "normal thing to do" (MacDonald, Tr. p. 1541). In fact, Mr. Stevens, to whom Mr. Berg spoke, was merely Haupt's controller, an employee who supervised Haupt's commodities department. Mr. Stevens was not even a partner at Haupt, much less its managing partner, and Mr. Berg knew this (Berg, Tr. pp. 2119, 2138).

Mr. MacDonald also thought that Mr. Berg had ascertained that Haupt had obtained hedge letters from Allied (MacDonald, Tr. pp. 1654-55), when in fact Mr. Berg did not ask Mr. Stevens whether Haupt had received a hedge letter from Allied (Berg, Tr. pp. 2147-48).

Regarding Mr. Berg's purported investigation of Mr. DeAngelis, Mr. MacDonald has testified that Mr. Berg saw enough of Mr. DeAngelis' records regarding forward sales contracts to satisfy himself that Mr. DeAngelis' position was justified (MacDonald, Tr. p. 1583); however, Mr. Berg in fact saw no such records (Berg, Tr. pp. 2131, 2148-55).

Both Mr. Berg and Mr. MacDonald have testified that Mr. DeAngelis promised to reduce his position during a September meeting with Mr. Berg, but that Mr. DeAngelis did not keep his promise (MacDonald, Tr. p. 1585; Berg, Tr. p. 2169). Mr. MacDonald has testified that Mr. Berg contacted Mr. DeAngelis again, in late September or early October, to ask why he had not reduced his position as promised (MacDonald, Tr. pp. 1589, 1932, 1950), and that Mr. MacDonald was not inclined to believe Mr. DeAngelis' reason for increasing his position (MacDonald, Tr. pp. 1933-34). Mr. Berg, however, did not discover until November 14 that Mr. DeAngelis had not reduced his position as promised, and made no effort in the interim to determine whether Mr. DeAngelis had kept his promise (Berg, Tr. pp. 2169-70; 2174).

Finally, subsequent to the September 23, 1963, meeting with Mr. Boyer and other representatives of the Clearing Association, the Exchange took no steps independent of those taken by the Association concerning the subject matter of that meeting (see Section I-D, supra).

The evidence of a disorderly market during 1963 was grossly apparent. The failure of defendants properly to discharge their duties as Exchange managers is equally apparent.

G. Members of the Board of the Exchange in 1963 had both a statutory and a fiduciary duty to be aware of conditions affecting the market which they were charged to regulate.

It is a stipulated fact that in 1963 the New York Produce Exchange was a New York membership corporation* designated as a contract market by the Secretary of Agriculture (Pre-Trial Order, Schedule A, para 8). It is further stipulated that management of the Exchange was vested in the Board of Managers which included the President, the Vice-President and Treasurer of the Exchange (Pre-Trial Order, Schedule A, para. 9.)

Under both New York State and Federal law, it is a settled proposition that corporate directors and officers occupy a fiduciary or trustee relationship to their corporation and owe an active duty of faithful and diligent conduct. See, e.g., Schenker v. E.I. Dupont de Nemours & Co., 329 F.2d 77 (2d Cir. 1964); Hausman v. Buckley, 229 F.2d 696 (2d Cir. 1962); People v. Marcus, 261 N.Y. 268

* The Second Circuit observes the well-recognized principle that the law of the state of incorporation governs the existence and extent of corporate fiduciary obligations, as well as liability for violations of these obligations. McDonnell v. American Leduc Petroleums Limited, 491 F.2d 380 (2d Cir. 1974); Hausman v. Buckley, 229 F.2d 696 (2d Cir. 1962); Gilderhorn v. Lum's, Inc. 335 F.Supp. 329 (S.D.N.Y. 1971).

(1933); Kavanaugh v. Kavanaugh Knitting Company, 226 N.Y. 185 (1919); Kavanaugh v. Commonwealth Trust Company, 223 N.Y. 103 (1918).

The defendant members of the Board of the Exchange in 1963 were charged with the active duty of regulating the Produce Exchange in good faith. 7 U.S.C. §7; Exchange By-Laws §§67, 67a, 68. Implicit in their fiduciary obligation was the duty to be aware of market conditions affecting the orderly functioning of the cottonseed oil futures market. Indeed, regulation of the Produce Exchange had to be carried out in furtherance of the fundamental purpose of the Commodity Exchange Act; and undisputedly it was the fundamental purpose of the Act

> "to insure fair practice and honest dealing on the commodity exchanges and to provide a measure of control over those forms of speculative activity which too often demoralize the markets to the injury of producers and consumers and the exchanges themselves." H.R.Rep.No. 421 p. 1, 74th Cong. 1st Sess. (1935) (emphasis added).

Seligson v. New York Produce Exchange, 378 F.Supp. 1076, 1084 (S.D.N.Y. 1974); See Commodity Exchange Act §3, 7 U.S.C. §5.

Fair practice and honest dealing on a commodity exchange cannot be insured if those charged with effectu-

ating the purpose of the Act purport to regulate in an informational vacuum. Rather, those governing a commodity exchange must be reasonably in touch with the market they are regulating so that they may be able to recognize those types of market activity which affect their regulatory responsibilities.

A member of the Board of a commodity exchange can not remain an island of ignorance in a sea of information and then claim that such ignorance immunizes him from responsibility for negligent failure to regulate his exchange. Clearly Harold Vogel, as a matter of law, negligently failed to perform his duties as a manager of the Exchange during 1963. His hallmark is that he knew nothing and was rarely there.

Directors of corporations have been held liable for negligence when they have failed to attend board meetings or otherwise remain aware of relevant business conditions. Bowerman v. Hammer, 250 U.S. 540 (1919); Martin v. Webb, 110 U.S. 7 (1884); Michaelson v. Penney, 135 F.2d 409 (2d Cir. 1943); Harman v. Willbern, 374 F.Supp 1149 (D.Kan. 1974) ("The directors of a corporation may not totally abandon their duties to the corporation or close their eyes to what is going on about them in the conduct of the business of the corporation and then use this as a defense for injury which results"); Nichols-Morris Corp. v. Morris, 174 F.Supp. 691 (S.D.N.Y. 1959); Kavanaugh

v. Commonwealth Trust Co., 223 N.Y. 103 (1918); Platt Corp. v. Platt, 42 Misc.2d 640, 249 N.Y.S.2d 1 (Sup. Ct., N.Y. Co., 1964), reversed on other grounds, 17 N.Y.2d 234 (1966).

In Bowerman, supra, plaintiff alleged that the defendant was negligent in the performance of his duties as a bank director by failing to attend meetings of the board of directors, and to examine or have examined books and papers of the bank to ascertain its condition. In upholding plaintiff's position the United States Supreme Court stated:

> "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers . . . . That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." (250 U.S. at 512) (quoting Martin v. Webb, 110 U.S. 710 (1884)

Similarly, in Platt, supra, plaintiff alleged that corporate directors negligently performed their duties as directors by their failure to attend directors' meetings; by their lack of awareness of corporate affairs; and by their lack of exercise of independent supervision and control of

corporate affairs. The Platt Court found such behavior to constitute acts of negligence, stating:

> "It is the obvious duty of directors to know what is transpiring in the business affairs of their corporation. They cannot assume the responsibilities of their fiduciary position, then simply close their eyes to what is going on around them and thereby avoid the consequences by the mere failure to act. While corporate directors are not liable for errors of judgment, nevertheless, the law holds them accountable for that which they reasonably should have known or discovered in the discharge of their duties [Manheim Dairy Company Inc. v. Little Falls Nat. Bank, 54 N.Y.S.2d 345 (Sup. Ct., 1945)] Mere passivity and disavowal of knowledge alone do not and should not constitute a pass to freedom from responsibility." (emphasis supplied) (42 Misc.2d at 249 N.Y.S.2d at 6.)

Directors of corporations not only have this duty to be aware of relevant business and market conditions, but they must have a general knowledge of the manner in which the business is conducted or must reasonably attempt to acquire this knowledge. Michelsen, supra; Nichols, supra, at 696 ("One who accepts, and continues in office takes with it all its responsibilities and duties, and must measure up to its demands."); Kavanaugh, supra, at 106 ("[directors] should know of and give direction to the general affairs of the institution and its business policy, and have a general knowledge of the manner in which the business is conducted").

There is ample evidence in the record of the availability of information, the existence, nature and importance of warning signs that pertinent market conditions were awry during 1963. By accepting positions as member of the Board and the Executive Committee of the defendant Exchange, each individual defendant undertook the duty to be reasonably aware of market activities and conditions; to act reasonably upon such an awareness; or, alternatively, to accept liability for failing to meet the responsibilities of office.

POINT II

PRIOR TO NOVEMBER 14, 1963 THE DEFENDANTS, IN BAD FAITH, FAILED TO REGULATE THE EXCHANGE

Plaintiff contends that during 1963 and prior to November 14 the Exchange and defendant members of its Board abdicated their statutory and fiduciary responsibility to regulate and did so in bad faith. The inaction of the Exchange Board flowed from the ultimate inability of key members of the Executive Committee of the Board to resolve conflicting loyalties, desires and opportunities with their duties as Exchange directors. The conflict grew out of the desire or opportunity to serve their respective corporate employers or partnerships [see People v. Marcus, 261 N.Y. 268, 277 (1933); De Sessa v. City of White Plains, 219 N.Y.S.2d 190 (Sup. Ct. West. Co. 1961)]; the desire or opportunity to benefit the Exchange as an entity; and their respective duties and responsibilities under the Commodity Exchange Act, the By-Laws and the Trading Rules of the Exchange to prevent price manipulations and disorderly markets.

A. All of the defendants profited from the Activities of Allied and DeAngelis prior to November 14, 1963

The activities of Allied and DeAngelis redounded to the financial benefit of all defendants during 1963. Plaintiff contends that for this reason, among others, the defendants failed to meet their Exchange responsibilities that year.

The Exchange itself benefited from the activities of Allied and DeAngelis. The cotton seed oil futures market was more active than ever. The commission brokers and floor brokers on the Exchange made more commissions as a result of this activity. These brokers included defendants Merrill Lynch, Anderson and Board members Preston and Rheders. Defendant MacDonald, suddenly, found himself President of an active Exchange, moving in the company of powerful executives of the major companies in the industry.

Moreover, defendants Bunge and Continental were benefiting directly from Allied's activities and had been doing so over a period of years. Their representatives, Messrs. Klein and Vogel, either knew or must have known of the benefits derived by their companies. Similarly, Mr. Anderson knew or must have known that Merrill Lynch was

benefiting as broker for Bunge and Continental in this regard (Sections II B and C, infra).

B. Bunge, Continental, Merrill and their respective Exchange representatives either knew or must have known that Allied was engaging in ex-pit activities giving rise to a price manipulation during 1963

In February of 1963, Anthony DeAngelis approached Bunge Corporation with a new financing proposal. (DeAngelis, Tr. pp. 2774, 2775, 2837, 2869; Fornari, Tr. pp. 3431, 3432; plaintiff's Ex. 93 in evidence) The proposal, quite apparently, was born out of the desperate financial condition of Allied and the misguided genius of Mr. DeAngelis in his continuing efforts to obtain funds necessary to carry on his business. Shortly thereafter, Mr. DeAngelis approached Continental Grain with virtually the identical proposal. (DeAngelis, Tr. pp. 2779, 2780) Both Bunge and Continental agreed to Mr. DeAngelis' proposal. In so doing, plaintiff contends, both Bunge and Continental enabled Mr. DeAngelis and his company, Allied Crude, to manipulate prices of cottonseed oil futures contracts traded on the New York Produce Exchange during 1963. At the same time, they enabled Allied to continue its pattern of futures buying that led to the overwhelming concentration of position and the potential for a squeeze in the near contract month

beginning no later than July of 1963. (See generally, testimony of Roger Gray and Section I-A, supra).

Professor Gray based his conclusion that there was a manipulation on the cottonseed oil futures market known to Bunge and Continental during 1963, upon evidence which includes:

1. The ex-pit transactions between Bunge and Allied described in plaintiff's Ex. 260 for identification and in Ex. 260 A through F in evidence; and

2. The ex-pit transactions between Continental and Allied described on plaintiff's Ex. 255 for identification and in plaintiff's Ex. 255 A through D in evidence.

(Gray, Tr., pp. 4370-4373). Professor Gray has described the manner in which the foregoing transactions indicate a manipulation (Tr., pp. 4383-4393) and the reasons supporting his conclusion that future positions, established by Allied in ex-pit transactions with Bunge and Continental, lacked integrity (Tr., pp. 4345-4397).

Professor Gray further has testified that Merrill Lynch, by virtue of serving as broker for Bunge in the ex-pit transactions designated plaintiff's Ex. 260 A through F

in evidence, knew that these were very large and unusual transactions (Gray, Tr. pp. 4419-4420).* Merrill Lynch could see that for that period of time, Bunge held Allied's warehouse receipts and returned them back to Allied (See Gray, Tr. pp. 4420-21).

Not only did Bunge and Continental contribute to Allied's price manipulation, but there is substantial evidence that Bunge and Continental were active participants in that manipulation. Of course, all defendants deny that there was any price manipulation; and further deny knowledge of any price manipulation which might have been occurring at the time. At minimum, however, the knowledge in both Bunge and Continental of (a) Allied's severe financial difficulty; (b) the restricted ability of Allied to obtain funds necessary in order to conduct its business; (c) the unique, guaranteed profit sales and financing agreements which Allied entered into with both Bunge and Continental; and (d) the increasing concern of Bunge and Continental with the security of the loans which they had previously made to

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* Professor Gray has given his expert opinion that a "round trip" ex-pit transaction which manipulates prices is significant when it involves 245 registered warehouse receipts (Gray, Tr. p. 4417). The effect of a price manipulation caused by a "round trip" ex-pit transaction involving 500 registered warehouse receipts would be substantial (Gray, Tr. p. 4415).

Allied, renders incredible any assertion made in behalf of either Bunge or Continental that they were not aware of the intent or consequences of Mr. DeAngelis' scheme to enable Bunge and Continental to make riskless loans to Allied through the vehicle of ex-pit transactions.

Moreover Bunge knew in fact that the purpose of Allied's ex-pit financing was to sustain the cottonseed oil futures market. Mr. Gittleman made this quite clear to Messrs. Forti and Fornari of Bunge (Gittleman, Tr. p. 3083) who in turn reported to and received approval of the deal from Mr. Klein, Bunge's President (Gittleman, Tr. p. 3083, 3085-86; Klein, Tr. p. 3651; DeAngelis, Tr. p. 2871).

Harold Vogel's company, Continental, was also making substantial sums of money by dealing with Allied during and prior to 1963. Continental was providing ex-pit financing to Allied. Continental was obtaining guaranteed profits both in sales and loans. The existence and magnitude of these arrangements between Allied and Continental was unparalleled in the relationship of Continental to its other suppliers during 1963. (Ferretti Tr., p. 3788-3791).

Raphael Totah, head of the Continental oil department acknowledged it is not unlikely that he mentioned to

Mr. Vogel and others (see Totah, Tr. p. 4179). It is a permissible inference on the record before this Court that Mr. Vogel was being less than candid when he denied knowledge of any of the details of the Continental-Allied relationship. Further, two separate statements made in pre-trial testimony (read to and disavowed by Continental trader, George Stafford on the witness stand Tr. pp. 4106-4109) further supports the inference that Mr. Vogel, a high Continental executive was familiar with some of the details of the important business relationship between Continental's oil department and Allied.* Mr. Totah has testified that he was out of the country for two months during the summer of 1963 (Totah, Tr. p. 4183-84). During this period of time Allied and Continental engaged in ex-pit transactions involving a substantial number of registered warehouse receipts (Ex. 255 A-D in evidence). It is reasonable to infer that in Mr. Totah's absence, Mr. Stafford discussed these substantial transactions with Mr. Vogel, the Executive Vice-president of the company and a man considered to be more familiar with

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* Indeed, plaintiff respectfully submits that the testimony of the Continental witnesses at trial has been inherently improbable; and that the jury is entitled to disbelieve the testimony and find that Vogel had sufficient knowledge both of the Continental Allied relationship and the short cottonseed oil futures position of his employer and failed to regulate the Exchange in good faith. This is particularly true with respect to the November 18-20 time period.

the Exchange and futures trading on the Exchange than Mr. Totah, head of the oil department (See Totah Tr. p. 4181).

During the summer of 1963, Merrill Lynch's representative Mr. Anderson heard that Allied Crude was doing a lot of trading on the Produce Exchange; and he had heard rumors that Allied was building up its position in cottonseed oil futures during the summer of 1963. In the fall of 1963 Mr. Anderson had received reports that Allied was engaging in ex-pit trades. (Anderson Tr., pp. 3184-85).

Merrill Lynch brokered Continental and Bunge's ex-pit loan transactions with Allied. In fact, Anderson during 1963 believed that Allied was on the opposite side of an ex-pit transaction on at least two occasions (Anderson, Tr. pp. 3195-98). Merrill Lynch, as broker for Bunge and Continental, stood to profit and did profit as broker for ex-pit trades between its customers Bunge or Continental and Allied Crude.

C. Bunge and Continental, prior to and during 1963, received huge profits and interest payments in their dealings with Allied

During and after 1960, Allied borrowed money from major U. S. vegetable oil exporters as part of a plan to expand Allied's business activities. Allied's principal source of financial support was the Bunge Corporation ("Bunge"), Continental Grain Company ("Continental"), and North American Continental ("NAC"), the predecessor in interest to the General Merchandise Division of Continental.

Between 1960 and 1963 Allied required the following financing from Bunge and Continental respectively:

	Bunge*	Continental**
1960	14,046,000	6,984,000
1961	78,495,000	5,785,000
1962	221,702,000	5,166,000
1963	110,467,000	34,803,000

From the outset, both Bunge and Continental received collateral as security against amounts loaned to Allied which exceeded 100% of the amounts loaned. (Forti, Tr. pp. 3535, 3555-56; Fornari, Tr. 3422; Ferretti, Tr. pp. 3788-90; Totah, Tr. pp. 4155-56).

* Fornari Tr., p. 3451.

** Ferretti Tr., pp. 3800, 3801.

2402a

Bunge and Continental received an identical guaranteed profit on the loans which they made to Allied as well. On the loans, this guaranteed profit gave Bunge and Continental amounts in addition to interest in the 6-7% per annum range. The guaranteed profit arrangement was incorporated as a term of the loans which Bunge made to Allied against field warehouse receipt collateral. Bunge Vice-President, Richard D. Forti, has admitted that in his 15 years of employment with Bunge prior to 1963 no other supplier entered into such arrangement which gave Bunge such guaranteed profit (Forti, Tr. pp. 3631-3632). Similarly, John D. Ferretti has testified that during 1963 there had been no other loan arrangement of any consequence with any of the suppliers to Continental's oil department (Ferretti Tr., pp. 3818, 3819).

The reason for these loans to Allied could be found in the desire of Bunge and Continental to encourage Allied to disregard business realities and to sell oil as middleman to Bunge and Continental at below manufacturer's cost. Both Bunge and Continental, or its corporate predecessor, NAC, exported substantial quantities of vegetable oil during the period 1960-1963. This oil could be obtained

for export directly from the source of origination, i.e., the major oilseed crushers in the United States. Allied was also in the business of exporting vegetable oils abroad. It, too, obtained its source of supply from the major oilseed crushers.

It is a fact, of which this court may take judicial notice, that a businessman, in the ordinary course of dealing, can obtain large quantities of inventory from an original source more cheaply than he can obtain such inventory from a middleman. From 1960 to 1963, both Bunge and Continental purchased 50% of the oil which they exported abroad from a middleman -- Allied Crude Vegetable Oil Refining Corp.

The oil supplied by Allied to Bunge and Continental, either for export or as collateral for loans, was part of an arrangement unique in the history of Bunge or Continental. Not only did Allied, as a middleman, supply Bunge and Continental with oil at rates which were cheaper than the rates quoted by the oilseed crushers themselves (DeAngelis, Tr., pp. 3048, 3049; Ferretti, Tr., pp. 3808-3810) but, in addition, Allied guaranteed Bunge and Continental a minimum of $2.00 per ton, or 9 ¢ per hundredweight, guaranteed

profit on the oil sales which Allied made to these companies. (Fornari, Tr., p. 3438; DeAngelis, Tr., pp. 2773, 2774, 2778, 2788, 2789).

POINT III

THE FAILURE TO SUSPEND TRADING ON NOVEMBER 14 AND THE SUBSEQUENT DELAY UNTIL NOVEMBER 19 REPRESENTED A WILLFUL, RECKLESS GROSSLY NEGLIGENT OR BAD FAITH FAILURE TO REGULATE THE EXCHANGE

A. The events of November 13-20, 1963

On November 13, 1963, Mr. DeAngelis informed Walter Klein and several of his colleagues at Bunge that Allied held roughly 8,000 cottonseed oil and soybean oil futures contracts (Klein Tr., pp. 3652-53). That same day, Harry Anderson was informed by a member of his staff at Merrill Lynch that Mr. DeAngelis held 50% of the long position in both the cottonseed oil and soybean oil futures market. Mr. Anderson became concerned and called upon Mr. Klein (Anderson Tr., pp. 3209-10, 3212, 3219).* At this meeting, Mr. Klein did not tell Mr. Anderson of the news that he had just learned from Mr. DeAngelis (Klein Tr., pp. 3662-63). After some discussion, they decided to call Mr. Berg and have him request the CEA to provide the Exchange with Mr. DeAngelis' position in cottonseed oil futures contracts (Anderson Tr., pp. 3221-22). Mr. Berg did so

*Apparently, Mr. Anderson contacted Mr. Klein both as an Exchange official and in Mr. Klein's unofficial capacity as client of Merrill Lynch.

(Berg Tr., pp. 2211-12).

On the morning of November 14, the CEA delivered to Mr. Berg a handwritten sheet setting forth the positions of all persons holding more than 100 contracts, both long and short (Ex. 1 in evidence; Berg, Tr. p. 2213). This sheet reflected that Mr. DeAngelis held 90% of the long position.

Exhibit 1 in evidence ("Report") also listed who the large shorts were. Mr. Berg conveyed this information to Mr. MacDonald, who directed him to lock up the report and call a special meeting of the Board that afternoon (Berg Tr. pp. 2223, 2234; MacDonald Tr. pp. 1615, 1646-47). Mr. Berg also told Mr. Anderson what was contained in that sheet (Berg Tr., p. 2224).

The special Board meeting was held on the afternoon of the 14th. At that meeting, both Mr. MacDonald and Mr. Anderson expressed concern as to the condition of the market and stated that one interest held a large percentage of the long position, but, because "nobody wanted to shake the apple tree," no one revealed that the Report had been received from the CEA or what information was contained

therein (Berg Tr., pp. 2275-76). A Control Committee, consisting of at least Mr. MacDonald and Mr. Berg was appointed to look into the situation (MacDonald Tr., p. 1673; Berg Tr., p. 2233). At the direction of the Board, the Control Committee, on November 15, wrote a letter to all clearing members and requested them to supply, by November 20, the names and positions of each of their customers holding positions of 15 contracts or more.

In the meantime, the market started to fall on November 14 and concern increased. Rumors commenced that Allied was in serious financial difficulty (Weinstein, Tr. pp. 1406-1407). Nevertheless, no one at the Exchange saw fit either to resurrect the CEA report from its locked hiding place or to use the telephone to ascertain the so-called information from the clearing members. The Control Committee never even met. On the night of November 18, a quorum of the Executive Committee, including Anderson, Vogel and MacDonald, imposed a 25-point limit on price fluctuation, effective November 19

On November 19, it was announced that Allied had filed for bankruptcy. Later that day, a joint meeting was held between members of the Executive Committee of the Exchange and members of the Board of the Clearing Association, along with representatives from Ira Haupt & Co., Williston & Beane, and other members of the Exchange. At this meeting, there was no mention made of the responses to the position call, some of which had been received at that time, or even in general of the positions of customers of clearing members, other than Allied (Berg, Tr. pp. 2300, 2311). The Haupt representatives stated that, in view of the Allied bankruptcy, if the market continued to decline, Haupt would default on its obligations to the Clearing Association (Anderson, Tr. p. 3266). Since everyone expected the market to decline further, except for defendant Fashena (Fashena, Tr. pp. 2577-78), those present at the meeting realized that the other clearing members might well have to pay out moneys pursuant to the default rule and that this could cause further financial disaster to clearing members and others in the trade (Anderson, Tr. p. 3272). It was, therefore, decided to

close the market and settle all outstanding contracts. The settlement price was then dropped substantially below the closing price (Ex. 156 in evidence) on Nov. 19, 1963 to take into account the full extent of the drop in soybean oil prices (MacDonald, Tr. pp. 1927-28).

B. During the November 13-20 period, the defendant members of the Board were grossly negligent or reckless in their disregard of their duty to regulate the market.

Plaintiff contends that the defendant members of the Board of Managers acted with gross negligence or in reckless disregard of their duty to regulate the market. An overwhelming concentration on the long side of the market was known to the Board and the Exchange on November 14. The situation demanded that immediate and decisive steps be taken. The actions of the Board were totally ineffective to deal with the urgent problem; if not completely illusory. Pertinent testimony of the respective defendants in this regard included the following:

1. Donald V. MacDonald

Mr. MacDonald neither communicated the existence of, nor the information on, the CEA Report to the full Board at the November 14 meeting. Instead he permitted the Board to elect a Control Committee, and to direct the Control Committee to send out a position call knowing that the Exchange already possessed all the information necessary to enable it to take action (Exhibit 1 in evidence). Mr. MacDonald claims that the information he was really interested in obtaining through this position call was the identity of the big shorts (MacDonald, Tr. p. 1699). Again, this was information which he could have obtained at a glance from the CEA Report (Exhibit 1 in evidence).

Further, although an experienced commodity broker, as a member of the Control Committee Mr. MacDonald used the

mail rather than the telephone to make a position call. In other Exchange situations calling for swift action -- as this situation most certainly did -- Mr. MacDonald knew how to use the telephone and did so (MacDonald, Tr. pp. 1938-39).

Mr. Anderson's testimony regarding his efforts on the morning of November 19 to find a buying group for the Allied contracts carried by Haupt (Anderson, Tr. pp. 3255-56, 3258-3260a), demonstrates that Mr. MacDonald's professed goal from November 14-20 of finding such a buying group (MacDonald, Tr. pp. 1699, 1930) could have been accomplished by telephone in a single morning. Further, the Control Committee was not in fact needed to lessen the possibility of a panic in the market, which a telephone call from the Exchange President might have caused since, in the normal course, Mr. Berg could have made such a call without causing much of a stir. (See MacDonald, Tr. pp. 1960-61).

Furthermore, despite the fact that Mr. MacDonald knew of the overwhelming concentration of the long position in Allied's hands, he has testified that he had no knowledge of, nor did he attempt to find out, the number of outstanding registered warehouse receipts; or whether the licensed warehouse capacity, for which registered receipts were not outstanding, contained cottonseed oil of a grade deliverable in satisfaction of a future contract on the Exchange (MacDonald, Tr. pp. 1726, 1732-34). Therefore, he could not have known, nor did he attempt to find out, whether Mr. DeAngelis could effectuate a squeeze in the next delivery month, December, the first delivery date of which

was only two weeks away from November 14 (MacDonald, Tr. pp. 1725-26).

Mr. MacDonald took no meaningful action to alleviate this overwhelming concentration of the long position, notwithstanding the fact that he was called on November 15 by Mr. Caldwell of the CEA. Caldwell, on the instructions of Mr. George Mehren, under Secretary of the Department of Agriculture, called to Mr. MacDonald's attention the section of the Commodity Exchange Act regarding the Exchange's duty to prevent manipulations, corners and squeezes and the CEA's power to take action against the Exchange if it did not fulfill properly its responsibility to maintain an orderly market (MacDonald, Tr. pp. 1750-51, 1967). Mr. MacDonald did not report this telephone call to any other member of the Board (MacDonald, Tr. pp. 1751-52).

In addition, Mr. MacDonald claims that he spoke to Mr. DeAngelis on the night of November 18 and learned that a 12 1/2 point drop in the market would bankrupt him (MacDonald, Tr. p. 1774). He did not, however, convey this news to the other members of the Executive Committee who voted on the evening of November 18 to impose a 25-point price limitation (MacDonald, Tr. pp. 1778, 1781-82). Nor did he notify Haupt that its customer would soon be bankrupt (MacDonald, Tr. p. 1932).

2. Sidney Fashena

At the meeting of November 14, which Mr. Fashena attended (Fashena, Tr. p. 2552-2553), Mr. Fashena claims he did not know that Allied held 90% of the long position. However,

he did know that the long position had become unduly concentrated (Fashena, Tr. p. 2514). Mr. Fashena knew that the situation called for immediate action -- yet he voted in favor of having the Control Committee send out a position call by letter, while admitting that information relating to clearing members, which the Control Committee was seeking, could have been obtained with a single telephone call to the Clearing Association (Fashena, Tr. p.2858). Furthermore, Mr. Fashena left the November 14 meeting with no clear idea of who was on the Control Committee; and took no steps to insure that the Control Committee properly carried out its function (Fashena, Tr. p. 2567-2569). In fact, the Control Committee never met (MacDonald, Tr.pp. 1720).

3. Harry B. Anderson

Mr. Berg informed Mr. Anderson of the extent of the Allied position as shown on the CEA report (Berg, Tr. p. 2224; Anderson, Tr. pp. 3224-25). However, like Mr. MacDonald, Mr. Anderson did not convey this information on November 14 either to the full Board of Managers or to the Control Committee (Berg, Tr. p. 2275). Thus, also like Mr. MacDonald, Mr. Anderson stood by while an unwitting Board voted to establish a Control Committee to obtain, in essence, the very information set forth on the CEA report. Furthermore, in what he knew was a very serious situation, Mr. Anderson permitted the Control Committee to send out the position call by ordinary mail, while admitting that he personally could have obtained the requested information from Merrill Lynch in

a much shorter period of time (Anderson, Tr. p. 3247-48).

4. Walter C. Klein

There is evidence that Mr. Klein knew the contents of the CEA Report with respect to Allied's position (Anderson, Tr. pp. 3224-3225, 3229-3231). He certainly knew the report existed. Yet he too did not tell the other Board members at the meeting of November 14. In any event, he was told by Mr. DeAngelis on November 13 that the latter had a position of roughly 8,000 cottonseed and soybean oil futures contracts (Klein, Tr. pp. 3652-53). However, he did not convey this information either to Mr. Anderson when he met him on the afternoon of November 13 (Klein, Tr. pp. 3662-63), or to the other Board members on November 14. Finally, Mr. Klein also knew that the Control Committee was seeking information on positions by letter only, when the situation demanded more immediate action.

5. Harold H. Vogel

Mr. Vogel missed the Board meeting of November 14, 1963. When he did return to town on November 18, he participated, as a member of the Executive Committee in imposing a 25 point price fluctuation limit on trading, effective November 19. When contacted to vote on the restraint of trade, Mr. Vogel asked no questions, exercised no independent regulatory judgment and cast his vote with reckless disregard of his regulatory duties.

C. On and after November 13, 1963, Defendant Members of the Board acted in bad faith in failing to properly regulate the market.

Plaintiff contends that the defendant members of the Board of Managers acted in bad faith from November 13 to November 20, 1963 in failing to properly regulate the market, the defendants profited from keeping the market open and/or sought to benefit the short interests. Pertinent testimony with respect to defendants in this regard included the following:

1. Donald V. MacDonald

Defendant members of the Board, including Mr. MacDonald chose to ignore their clear duty to close the market on November 14. Mr. MacDonald believed the price of cottonseed oil futures was too high on November 14 (MacDonald, Tr. pp. 1756-59). Indeed, Mr. MacDonald told Mr. Caldwell of the CEA on November 15, 1963 that there existed a good opportunity to sell oil. Mr. MacDonald's actions reached the height of absurdity in the context of market regulation. Such behavior can best be explained by an assumption of bad faith.*

* Mr. MacDonald participated in setting the 25 point price fluctuation limit on November 18 (MacDonald, Tr. p. 1882). When the shorts threatened suit and Mr. MacDonald disregarded the 25 point limit to the benefit of the shorts, he favored the shorts in bad faith at the expense of Ira Haupt & Co. and others representing holders of long positions.

Mr. MacDonald has testified that he thought that on November 14 the futures price was too high (MacDonald, Tr. pp. 1756-1759). Indeed he told Mr. Caldwell that it was a good opportunity to sell oil.

2. Harry B. Anderson

On November 14, 1963, virtually all of Merrill Lynch's customers held short positions in cottonseed oil futures (Ex. 1 in evidence).* It is a stipulated fact in this action that Bunge and Continental were important and valued customers of Merrill Lynch. As the head of Merrill Lynch's Commodities Department, Mr. Anderson must have known the positions of Bunge and Continental. In addition, there is evidence at least that Mr. Anderson did, in fact, know Continental's position prior to November 19 (Vogel, Tr. p. 3944-3945). Further, Merrill Lynch was the broker for Bunge from November 14 to November 19, when Bunge was selling short and establishing a speculative net short position in cottonseed oil. (See III-C-3, infra).

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* John Fontana, a floor broker on the Exchange during 1963 has testified that Merrill Lynch was selling the market down in the last few days before the close in November, 1963 (Fontana, Tr. p. 1092).

Mr. Anderson thought prices were too high during this period. Anderson never monitored Merrill Lynch activity and never checked with Bunge. It is reasonable to conclude that Mr. Anderson's actions from November 14-19 were prompted by a desire to aid Merrill Lynch's good and valued customers, Bunge and Continental. Indeed, there is substantial evidence that Mr. Anderson himself may have communicated the inside information which he received from Mr. Berg of the Exchange regarding Mr. DeAngelis' position to his client, Mr. Klein, and thereby enabled his client to profit as a result of a joint, bad faith failure to regulate (See Anderson, Tr. pp. 3224-25, 3229-31).

3. Walter C. Klein

On November 14, Mr. Klein instructed Messrs. Forti and Fornari to begin selling short for Bunge's own account on both the New York Produce Exchange and the Chicago Board of Trade. Mr. Klein admits that he learned on November 13 that Mr. DeAngelis held approximately 8,000 cottonseed oil and soybean oil futures contracts (Klein, Tr. p. 3658). In addition, there is evidence that Mr. Klein knew the full extent of Mr. DeAngelis' position from the CEA report, either through Mr. Anderson (Tr. pp. 3223-3224, 3229-3230) or from

the fact that Mr. Kenner, Bunge's house counsel, possessed such knowledge on November 14 (DeAngelis, Tr. p. 2883-2887). Defendant Bunge therefore used inside information regarding Allied's position to profit by trading during the last week; and to the extent that Mr. Klein received this information from Mr. Anderson, there was a joint bad faith failure to regulate. Professor Gray has concluded that Bunge's position during this period was speculative (Gray, Tr. p. 4508). Bunge's speculative profit was in excess of $500,000 in cottonseed oil futures alone, and Bunge increased its short position from November 14 to November 20 in soybean oil futures, as well (Ex. 154). Finally, Bunge's profits reflected the benefit of a settlement price on November 20 which favored those with a short position.

4. Harold H. Vogel

Despite his repeated denial of any knowledge of oil and the market conditions relating thereto, on and after November 19 Mr. Vogel became an outspoken participant in the discussion to suspend trading and close the Exchange.

While Continental's trading activities during the November 14-20 period were not so dramatic as Bunge's, it is none the less true that Continental's combined cottonseed and soybean oil futures position increased from net short 3710 on November 14 to net short 3717 on November 18. Further, the substantial short futures position of 1375 cottonseed oil futures contracts on Novmeber 19 assured Continental of

handsome profit on the market decline.*

During the November 18-20 period, while Mr. Vogel voted to suspend trading and lower the close out price for cottonseed oil futures contracts, his company was assured a million dollar profit in variation margin payments on the market close out of its short futures position (Ex. 258a in evidence, prepared by Mr. Ferretti, an officer of Continental Grain).

* Continental has prepared contradictory statements as to their net position in cottonseed oil, both cash and futures. These documents do not hide the irrefutable fact that Continental experienced only a modest 125 contract decrease in the size of its substantial short futures position and no change in its cash position between November 14 and 20, 1963 (Ferretti, Tr. pp. 4043-44). Most certainly this is not a substantial change of net position and in no way does it suggest a lack of culpable behavior on the part of Continental or its Exchange representative, Mr. Vogel.

POINT IV

THE DEFENDANT FIRMS AND THE EXCHANGE ARE LIABLE FOR THE ACTS OR OMISSIONS OF THEIR RESPECTIVE REPRESENTATIVES WHO SERVED ON THE BOARD OF MANAGERS OF THE NEW YORK PRODUCE EXCHANGE

A. The Liability of the New York Produce Exchange

The defendants, Vogel, MacDonald, Klein, Fashena and Anderson were members of the Board of Managers. Their function was to regulate the New York Produce Exchange. Their regulatory acts or omissions were obviously within the scope of their employment on the Board and as such, the Produce Exchange is liable for any injury proximately resulting from these acts or omissions. E.g., Gleason v. Seaboard Airline & Co., 278 U.S. 349 (1929); Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962).

B. Defendants Bunge, Usiskin, Continental and Merrill Lynch, as a matter of law, are liable for the action or inaction of their representatives on the New York Produce Exchange during 1963

The bases for imposing such liability are at least twofold: 1) the principals have guaranteed the acts of their representatives as members of the Exchange, including their service on the Board of Managers of the Exchange;

and 2) the acts or omissions of Messrs. Klein, Vogel, Fashena and Anderson were taken while in the furtherance of and within the scope of their employment.

1. The Guarantee given by Continental, Bunge and Merrill Lynch

On March 3, 1959, Harold Vogel applied for membership on the New York Produce Exchange. In connection with Mr. Vogel's membership application, Continental Grain executed a "Principal's Guarantee in Connection with Application for Membership" wherein Continental stated:

> ". . . we hereby guarantee the faithful performance of any contracts [Harold Vogel] may make in our name and hold ourselves responsible for his acts as a member of the Exchange, during such time as he may remain in our employ or until the Exchange shall be notified in writing that he is no longer employed by us and that we will no longer assume further responsibility for his acts or guarantee further contracts made by him". (emphasis supplied).

(Ex. 208 in evidence). Bunge Corporation supplied an identical guarantee in connection with the application for membership of Walter Klein. (Ex. 200 in evidence). Similarly, Merrill Lynch has guaranteed all acts of Harry B. Anderson as a member of the Exchange (Ex. 204 in evidence).

The membership applications of Messrs. Vogel, Klein and Anderson were accepted by the Exchange together

with the accompanying principal's guarantee. It is undisputed that Messrs. Vogel, Klein and Anderson were in the respective employ of Continental, Bunge and Merrill Lynch at all times during 1963. Further, none of the guarantees were revoked by the principal at any time during 1963. From the foregoing it is evident that, as a matter of law, Bunge, Continental and Merrill Lynch must stand behind the acts or failures to act of Messrs. Klein, Vogel and Anderson respectively, as their representatives on the Exchange, including the failure of their representatives properly to regulate the Exchange during 1963.

2. The Acts of the individual defendants as members of the Board of the Exchange in 1963 are, in any event, attributable to their respective firms

Walter Klein was President of Bunge Corporation. As such, there can be no doubt that his service on the Board of Managers of a commodity futures exchange in which his company actively traded futures contracts came well within the scope of his employment with Bunge Corporation. Furthermore, Mr. Klein has testified in this action that he became a member of the Board of Managers as a representative of Bunge (Klein, Tr. p. 3639); and that he replaced the

prior Bunge representative on the Board of the Exchange when that representative retired (Klein, Tr. p. 3639). In addition, when Klein couldn't attend the Board meeting of November 19, 1963, Mr. Forti went to represent Bunge in the place of Mr. Klein. Further, Klein stated in his application for membership on the Exchange that he intended to represent Bunge Corporation (Ex. 200 in evidence).

Similarly, the failure of Harry B. Anderson, Harold Vogel and Sidney Fashena properly to regulate the New York Produce Exchange in 1963 must be attributable to their respective corporate employers, Continental, Merrill Lynch, and I. Usiskin & Co. ("Usiskin") given the executive capacity in which these men served their respective firms. Michel Fribourg, President of Continental has admitted that Mr. Vogel's service on the Board of the Exchange constituted at least a "minor duty" of Mr. Vogel in his employ by Continental. (Fribourg, Tr. pp. 4208-4209). Further, Mr. Vogel's application clearly stated his intent to become a member of the Exchange "As officer of Continental Grain" (Ex. 208 in evidence). Mr. Hankin of Merrill Lynch has testified that Mr. Anderson, head of the Merrill Lynch

Commodity Department, represented Merrill Lynch on the Boards of all exchanges (Hankin, Tr. p. 3395); see also Anderson 9-G Statement.

Mr. Fashena has testified that he became a member of the Board of Managers because he "was a small trader representing a small trading firm"(Fashena, Tr. p. 2497-98). Moreover, Usiskin was a firm whose primary business was futures trading and Mr. Fashena's position on the Board was not unexpected to the partnership (Fashena, Tr. pp. 2497-2498).

It is a basic application of the general rules of agency* that if an individual defendant is found liable, his liability may be imputed to his firm if the actions or inactions from which his liability flows were within the scope of his authority. Seligson, 378 F.Supp. at 1089.

Further, it is evident that the Produce Exchange was, in 1963, a highly organized regulatory body with firm control over its members and the market it policed. It is evident that the nature of the relationship between the Exchange and Bunge, Usiskin, Continental and Merrill Lynch, respectively, justifies the finding that the participation

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* See Restatement, 2nd Agency Sections 216, 219, 228-236; N.Y. Partnership Law, Sections 20, 22, 23, 24 (McKinney 1948).

of executives or these firms in the management and the committee structure of the Exchange was an integral part of the employment of these executives in the industry. Seligson, 378 F.Supp. at 1089; see Vandervelde v. Put & Call Brokers and Dealers Ass'n , 344 F.Supp. 118 (S.D.N.Y. 1972). Moreover, as in context of Vandervelde, Bunge, Usiskin, Continental and Merrill Lynch in this action most assuredly had a direct interest in the subject matter of the controversy. Seligson, 378 F.Supp. at 1089. (See Sections II and III supra; see also, Plaintiff's Exs. 187, 188, 189, 190 in evidence -- summary charts which list the extensive participation of Bunge, Usiskin, Continental and Merrill Lynch partners, officers and employees in the management and committee structure of the Exchange during 1963).

The nature of the industry, the guarantee provided by the corporations and partnerships involved, the foreseeability to these respective firms that their partners or their top ranking officers would accept such industry-related positions and the statements of intent of these officers and of others at their respective firms further compel the conclusion that the acts or omissions of these

individual defendants were taken in furtherance of their employment with their respective firms. Blau v. Lehman, 368 U.S. 403 (1962); Feder v. Martin Marietta Corp., 406 F.2d 260 (2d Cir. 1969); Egan v. United States, 137 F.2d 369 (8th Cir.), cert. denied, 320 U.S. 788 (1943); Seligson v. New York Produce Exchange, 378 F.Supp. 1076 (S.D.N.Y. 1974); Vandervelde v. Put & Call Brokers and Dealers Ass'n , 344 F.Supp. 118 (S.D.N.Y. 1972).

POINT V

DEFENDANTS' BAD FAITH FAILURE TO REGULATE THE EXCHANGE VIOLATES THE ANTITRUST LAWS

This Court has reaffirmed plaintiff's private right of action under the antitrust laws against the Exchange, the individual defendants and certain of their corporate or partnership employers in 1963 for willful, reckless or bad faith regulation or failure to regulate the Exchange. Seligson v. New York Produce Exchange, 378 F.Supp. 1076 (S.D.N.Y. 1974). See also, Deaktor v. Schreiber & Co., 479 F.2d 529 (7th Cir.), rev'd on other grounds, 414 U.S. 113 (1973). An exchange designated as a "contract market" by the Secretary of Agriculture does not enjoy blanket immunity from the antitrust laws. Daniel v. Board of Trade, 164 F.2d 815 (7th Cir. 1947); Cargill, Inc. v. Board of Trade, 164 F.2d 820 (7th Cir. 1947); Phillips v. Chicago Mercantile Exchange, 479 F.2d 529 (7th Cir.), rev'd on other grounds, 414 U.S. 113 (1973), see also, Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Thill Securities Corp. v. New York Stock Exchange, 433 F.2d 264, 268 (7th Cir. 1970), cert. denied, 401 U.S. 944 (1971). ("The Supreme Court has soundly rejected any notion that the [New York

Stock] Exchange enjoyed blanket immunity from the enforcement of the antitrust laws. . .").

By definition, a commodity exchange restrains trade. Board of Trade v. United States, 246 U.S. 231 (1918). Its rules determine how transactions on an exchange should take place. An exchange, through control over its membership roles, determines who can engage in transactions on the exchange. The requirement that all futures contracts conform in both form and substance to exchange rules presents a threshhold restraint of trade. (Rule 1 of the Cottonseed Oil Trading Rules of the New York Produce Exchange, plaintiff's Ex. 56 in evidence). The limited immunity of a commodity futures exchange from the antitrust laws must be narrowly construed to encompass only those restraints of trade necessary to carry out the purposes of the Commodity Exchange Act. See, Silver v. New York Stock Exchange, supra; Harwell v. Growth Programs, Inc., 451 F.2d 240 (5th Cir. 1972); Cargill v. Board of Trade, 164 F.2d 820 (7th Cir. 1947).

As the court in Harwell stated:

> Silver then furnishes the guide which must be followed, i.e., that the repeal of the antitrust barrier to defendants' action occurs only if those actions are necessary

> to make the statutory scheme for regulation of securities work, and then [said antitrust barrier is repealed] only to the minimum extent necessary. (451 F.2d at 247) (Emphasis supplied.)

The purpose of the Commodity Exchange Act is set forth in H.R. Rep. 421 p.1, 74th Cong. 1st Sess. (1935) and Commodity Exchange Act §3, 7 U.S.C. §5. There is no argument that bad faith regulation, or failure to regulate for reasons of private pecuniary gain, can, in any way, further the purposes of the Commodity Exchange Act. It is only when an exchange restrains trade pursuant to actions taken in good faith that an exchange can claim the shelter of the limited exemption from the antitrust laws. The Silver case clearly reflects the Supreme Court's abiding concern with the fundamental concept that fair and honest dealings take place on an exchange; and the extent to which this concern will be taken into consideration in determining whether regulatory action of an exchange will be accorded an exemption from the antitrust laws. As was stated by the Silver Court:

> "Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought to have sanctioned and

> protected self-regulative activity when carried out in a fundamentally unfair manner." (373 U.S. at 364).*

Even prior to Silver, these propositions had been accorded full recognition in the context of commodity futures market regulation. In Cargill, supra, and its companion case Daniel, supra, plaintiffs alleged that the Chicago Board of Trade had, in bad faith, breached its regulatory duties, thereby violating the antitrust laws. Although the Court in Daniel found the evidence presented insufficient to support a finding of bad faith, it held that regulation motivated out of self interest would offend the Sherman Act. The Daniel Court stated:

> While we have held that the Board and Clearing were authorized to act as they did, we further hold that if, instead of acting as they purported to act in accordance with the rules and by-laws to meet an emergency and deal with it in a bona fide manner for the good of the market generally, they acted in their own selfish interest for their private gain, such action as alleged would vitiate the whole transaction. (Emphasis supplied) (Daniel, supra, at 820.)

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* This position is reinforced by decisional law governing other areas of commercial restraints which exist pursuant to a limited exemption from the antitrust laws. Thus, labor unions and agricultural cooperatives are, to a limited extent, exempt from the purview of the antitrust laws. However, where such organizations act in bad faith or in a fundamentally unfair manner, they are deemed to have exceeded the purpose of their limited exemption and are therefore subject to the proscriptions of the antitrust laws. See, e.g., Maryland & Virginia Milk Produce Ass'n., Inc. v. United States, 362 U.S. 458 (1968); United Mine Workers v. Pennington, 381 U.S. 657 (1965); United States v. Fish Smokers Trade Council, Inc., 183 F.Supp. 277 (S.D.N.Y. 1960). 89

Indeed, as this Court stated in its summary judgment opinion herein:

> . . . . The entire regulatory scheme administered by the Exchange would constitute a restraint of trade and violation of the Sherman Act were it not for the limited immmity to antitrust challenge necessary to effectuate an otherwise contradictory Congressional Act. To the extent that those charged with regulatory obligations under the Commodity Exchange Act willfully violate such obligations, the anti-competitive nature of the regulatory scheme persists without the countervailing benefit of achieving the purpose of the Act. Defendants err in separating out closing of the market and settlement of contracts as a restraint, without recognizing that bad faith regulation by the Exchange is itself a restraint of trade. (Emphasis supplied) (378 F.Supp at 1104)

Defendants did indeed fail to regulate the Exchange in bad faith during 1963. They did so prior to November 14 by refusing to kill the Allied goose which was laying an abundance of golden eggs (see II, supra). They did so on and after November 14 by refusing to close the market, to the benefit of the shorts including Bunge and Continental, and to the detriment of the longs including the brokers clearing contracts for the longs, such as Ira Haupt & Co. Further, the Exchange and certain of its managers enabled Bunge to trade on inside information obtained from the CEA for the purpose of preventing price manipulation and a threat to

orderly marketing. Bunge accomplished this inside trading through Merrill Lynch, having obtained this information from Harry B. Anderson. The Exchange permitted this trading by Bunge and conducted no investigation despite the fact that Managing Director Berg had told Anderson of this CEA report, knew Merrill was broker for Bunge, and knew Merrill was taking short positions, if not, in fact selling down the market prior to its collapse. (Section III, supra). Accordingly, the defendants failed to regulate the Exchange, their failure was done in bad faith and in so doing, they injured Ira Haupt & Co. and violated the anti-trust laws of the United States.

2435

CONCLUSION

For all of the foregoing reasons, plaintiff, the Trustee in Bankruptcy of Ira Haupt & Co., Ltd., Bankrupt, respectfully requests that the respective motions of defendants pursuant to Rule 50(a) of the Federal Rules of Civil Procedure be, in all respects, denied.

Dated: New York, New York
October 20, 1975

Respectfully submitted,

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Excerpt of Deposition of Richard D. Forti, Taken Pursuant to Stipulation With American Express

A No.

Q Mr. Klein never did?

A No.

Q Nor Mr. Fornari?

A No.

Q Nor Mr. Groeneveld?

A No.

Q You testified earlier that you did subsequently have a conversation with Mr. Klein about the check, either six months or four to eight months after the incident; is that right?

A Right.

Q Let me ask you again whether you recall the circumstances of this discussion.

A Did I?

Q Let me ask you again whether you recall the circumstances of this discussion.

A No, sir. No more than I told you before.

I think we were discussing matters concerning Allied in general, and this subject came up.

Q Mr. Forti, do you recall when Bunge first began asking for nonfungible storage?

MR. SCOTT: You mean identified tanks?

MR. REYCRAFT: Identified tanks. You are

right.

A Identified tanks. I think it was around April 1963.

Q Do you know why that happened? Why that subject came up?

A Yes.

MR. SCOTT: Just a moment. Perhaps I misunderstood. You are now talking about the nonfungible receipts?

MR. REYCRAFT: The nonfungible receipts, that is right.

THE WITNESS: Identified tanks?

MR. SCOTT: There are two things. And I want to be sure what your question is addressed to, that is all.

MR. REYCRAFT: The nonfungible receipts is the question I asked.

MR. SCOTT: All right.

THE WITNESS: Which doesn't mean identified tanks now?

MR. REYCRAFT: I beg your pardon?

THE WITNESS: Which doesn't mean --

MR. SCOTT: May I just explain?

MR. REYCRAFT: Surely.

MR. SCOTT: The point is, and it is already a matter of record, but there was a sequence of events. You were first asked for identified tanks and then later asked for storage on a nonfungible basis.

THE WITNESS: Right.

A I would say that this was a continuous process of evolution, if you want to put it that way, which was going on all the time. I mean all the people in Bunge were responsible for this operation. Everyone of us tried as much as possible, as hard as possible, to think of better means, of better ways which would make the operation less risky for Bunge.

So it's possible that this thought of getting tanks where oil could not be pumped in and out all the time; oil would be segregated, designated as oil specifically pledged to Bunge -- something that had been in our mind perhaps for a long time, because this would have followed the pattern of what Bunge did in other terminals with other warehouses, not in Bayonne.

There Bunge would list a tank; would give specific instructions for certain oils to be pumped in and out.

In other words, Bunge would maintain specific

"A Well, that subject of not having tank numbers was raised by myself on that January occasion when I sat there in the office of Mr. Klein and we had Mr. Forti and Mr. Fornari and myself.

"That was one of the things I pointed out. We were without tank numbers and therefore it was not easy" -- and so forth.

MR. SCOTT: I had forgotten that.

BY MR. REYCRAFT:

Q Mr. Forti, you do know that subsequently tank numbers were obtained; is that right?

A Yes.

Q Do you know who made the arrangements with Allied to obtain the tank numbers?

A I think all of us might have participated in one way or the other. I think this is something that we discussed with Kenner. We certainly discussed it with Fornari and with Groeneveld. I don't remember that particularly I was the one who spoke to Allied about this, or just carried out the details.

I would say that the details would be worked out by Groeneveld or possibly that Mr. Fornari told him. I might have mentioned the general idea to Tino.

In fact, if I remember correctly, there was --

it was so because at one time -- and don't ask me for the date, please -- but I know that Tino wrote a letter in which he was not very keen about this.

So there were discussions. I might have, I am sure, mentioned it to Allied. I am sure Mr. Fornari has. I am sure Mr. Groeneveld has. Now, who was the first one, I don't know.

Q Did I understand you to testify that you thought Mr. Groeneveld might have made the arrangements?

A The physical, the final arrangements?

Q Yes.

Just a minute. Who made the arrangements initially with Allied, telling Allied, "We want tank numbers"?

A Sir, I don't know if -- I would say that this conversation has taken place. As far as Bunge is concerned, I would say all of us have participated: Mr. Kenner, Mr. Fornari, myself and Groeneveld. I am sure that at one time or the other the four of us havementioned something to that effect to Allied. In what sequence I do not remember.

MR. SCOTT: Just so the record is absolutely clear, we are now talking about tank numbers as distinguished from the nonfungible receipts.

MR. REYCRAFT: That is right. That is what I am asking about.

MR. SCOTT: All right.

THE WITNESS: You are still speaking only about tank numbers now?

MR. REYCRAFT: Yes.

THE WITNESS: Okay.

And in chronology tank numbers came before?

MR. REYCRAFT: That is right. And the answers you have been giving have been relating to tank numbers; isn't that right?

THE WITNESS: Well, let me say this: the tank numbers I think was prompted and motivated more by the idea of simplifying our inventory procedure, which is something that perhaps Groeneveld might have brought up, because it was more directly his own sphere, actually, the idea of getting segregated tanks. Though I think it was my own idea, which took shape, took final shape after the incident with Spain.

Q Which incident are you talking about?

A After the claim by Spain that allegedly contaminated oil had been shipped.

So my great preoccupation was to see that the

oil pledged to Bunge was of good merchantable quality, that Bunge could at any time sell, if necessary, both domestically and overseas. That was the paramount thought in my mind.

And I think the final push towards the implementation of that idea or suggestion or request was the claim by the Spanish authorities.

So I would say that this took place around the turn of 1962 or early 1963.

Q And if I understand you correctly, it is your testimony that the tank numbers, the idea of having tank numbers was your suggestion; is that right?

MR. SCOTT: No. He did not say that.

MR. REYCRAFT: All right.

A I said that the idea of having segregated tanks--

MR. SCOTT: He said the idea of having segregated tanks was his idea.

A (Continuing) -- was my idea, which I discussed with Mr. Fonari and with Mr. Kenner and Mr. Groeneveld probably.

BY MR. REYCRAFT:

Q Who suggested the tank numbers? Do you have any recollection of that?

A Perhaps Groeneveld.

Q Did you ever have occasion to give instructions as to what the policy would be on obtaining tank numbers on warehouse receipts?

A I do not remember if there was memoranda. There might be, as you know -- I know that you are aware of this -- very often those memorandums were written either by Mr. Fornari or myself. We both looked at them. Maybe either one of us would initial them.

I don't know if there is any such thing in the record or not. So I don't want to contradict myself. But my recollection at the moment is not; that I did not give specific instructions to that. That is my recollection at the moment.

Q Instructions were given by someone, however, concerning tank numbers on receipts; is that right?

A Yes. It might have been in writing or verbally.

Q And if you did not do it, Mr. Fornari probably did; is that right?

A No. That is a presumption.

Or Mr. Groeneveld may have come to us and said "What about getting tank numbers."

We said, "Okay, Karl. Fine. See if you can do it."

Q Doyou know whether there were any exceptions

to the policy of getting tank numbers?

A Any exceptions?

Q Yes, sir.

A Which policy?

Q I understood that you acquiesced in my statement that there was a policy of getting tank numbers on warehouse receipts relating to Allied.

A I think that there were some exceptions later on if for one reason or the other we could not get a tank number or there was oil pledged to Bunge for a very short period of time. In other words, if it was a very short-term operation, there might have been exceptions -- I think there were -- in which Bunge did accept oil stored in tanks without a number on a temporary basis. I believe there were.

Q Did you make a decision at any time to accept such receipts?

A There probably were common decisions. Again consultations with Mr. Fornari and Mr. Groeneveld. It probably was decided. I don't remember specifically that there was any board meeting to decide that.

Q You do not have any specific recollection then if the subject of making exceptions to the policy of having tank numbers came up, do you?

A No, except as I just indicated to you: it is

possible on the spur of the moment some business was being negotiated for which Allied could only give a warehouse receipt relative to a tank where that oil was [illegible], and on the spur of the moment, in view of their business that was being negotiated and with what their business related to we made an exception.

MR. REYCRAFT: Let us take about ten minutes for a recess, please.

(Short recess.)

BY MR. REYCRAFT:

Q Mr. Forti, I understand from conversations that I had had off the record with Mr. Scott that your recollection has been refreshed with respect to your conversation with Mr. Klein concerning the $25,00 check, partly as a result of your conversation you have just had with Mr. Fornari. Would you care to state what your recollection now is.

A Yes, sir. As I said before, my basic recollection is that there was only one instance in which this paticular item was again discussed with Mr. Klein.

Now, I was not quite certain as to the date. In fact, if you recall, I was somewhat hesitant in pinning this down to a date. I did not. For lack of a better date I said six months. I subsequently added: It might

this any consideration. You asked me if I now think it was possible; is that correct?

Q I beg your pardon?

A You asked me if my opinion now --

Q I think I said did you think it was possible.

A No, at that time I didn't think. I did not give it any consideration. I did not know how this was going to be done.

Q Did you have any information during September of 1962 whether there was any physical interconnection between the Harbor Tank tanks and the American Express tanks?

A No, sir, I did not know that.

Q Do you recall ever discussing this subject at Bunge?

A No. There was no such discussion.

MR. REYCRAFT: Let us take about ten minutes.

(Short recess.)

BY MR. McCHORD:

Q Mr. Forti, you gave testimony yesterday on the subject of how the tank numbers started appearing on American Express receipts. This is still on a fungible basis. But you said that there came a time when tank numbers did start appearing.

What I would like to do now is to try to pin down your recollection as to exactly when that happened and what conversations you had with people at Allied and Bunge regarding the arrangement of this procedure. And just to refresh your recollection a little bit, I will state that as far as American Express is concerned, the tank numbers started appearing on receipts at the end of August 1962 and, with exceptions, continued to appear from then until April 1963, at which point the non-fungible storage started.

And the first and only tank numbers on Harbor Tank receipts, as I recall, were the two receipts involved in the September 26-27 incident.

With all this background, I would like to ask you, first of all: Was it you that arranged with Allied for the tank numbers to appear on American Express receipts?

A I cannot tell you for sure whether it was I or someone else.

Again I wish to emphasize that this was an operation in which many of us were involved at Bunge: Mr. Fornari, myself, Mr. Groeneveld, Mr. Kenner, Mr. Klein. Each one for a different aspect of the operation. Not to speak of many other people.

So you see, it is extremely difficult to pin down when an idea originated. Most of these ideas were a continuous process which was evolved in daily conversations. Mr. Fornari and I were sitting one next to the other. We were talking to each other all the time. It's utterly impossible for me to tell you that on the 25th of July it was the first time I told Mr. Fornari, "Look here, Harry, we have got to have this or we have got to have that."

These things did evolve within a certain period of time. We had an operation that we were learning by trial and error. We were realizing some mistakes that had been made. We were trying to improve upon the operation. We were trying to make it a better one. We were thinking of every possible way. So I cannot give you a date, a specific date.

I would say that the idea might have originated with me; it might have originated with Mr. Fornari; it might have originated with Groeneveld. It might have originated in conversations with Allied. As I indicated before, I remember there was a time where this was proposed by DeAngelis as an added inducement for Bunge to enter into some sort of an operation.

Q Are we talking about tank numbers now or are

MR. McCHORD: Read the question and answer, please.

(The last question and answer were read by the reporter.)

A (Continuing) This is essentially what I meant. The only thing I may want to add to this is that to bring back -- or to bring this down to zero would have meant a discontinuation, a cessation of any relationship with Allied to us: "All right, now you paid back all the loans. Now, good-by."

So what was present in my mind that unless that was the case, or unless Bunge would go out and liquidate all the stocks that were pledged to Bunge, in the course of normal business it would be unlikely that by the end of the year, by December 31st these loans would be reduced to zero. It might be considerably reduced, but not to zero, from a practical standpoint, and assuming that Bunge wanted to continue to do business with Allied.

I hope I have made this clear.

Q You referred yesterday to a guarantee that Mr. DeAngelis gave you with respect to new business. It is referred to in the letter of September 26th, and it is referred to in the last paragraph of Exhibit 93. I wonder if you would tell me what discussions you had with Mr.

DeAngelis about this guarantee, how it was supposed to work, and so forth.

THE WITNESS: Off the record.

(Discussion off the record.)

MR. McCHORD: Readthe question.

(The pending question was read by the reporter.)

A I would appreciate it very much if you would break down this question.

Q Did you have any discussions with Mr. DeAngelis regarding this guarantee?

A Which guarantee now?

Q The one referred to in the last paragraph of Exhibit 93.

A Did we have any discussion with DeAngelis concerning this? Yes.

Q What did he say?

A Exactly what is written here: That he came to us and he indicated to us that he would guarantee that much business.

This was a typical statement of DeAngelis, to say "I will guarantee you that much business."

Q He guaranteed you a certain margin of profit on the business, too, did he not?

A He would also guarantee Bunge a certain margin

of profits, yes.

Q What kind of business is he referring to here? Is he referring to purchases by Bunge from Allied accompanied by resales of the merchandise by Bunge to third parties?

A I think mostly the second: sales by Bunge to other parties.

Q Was it agreed between you and Mr. DeAngelis, or was it a part of this guarantee that he was talking about here that Mr. DeAngelis would have any control over the prices at which Bunge sold the merchandise?

A No. Mr. DeAngelis, in the expressions that he used and the language that he used and the pressure that he used, he would emphasize all the forthcoming business; would always show us lists of prospects, and he would put down this country for so much and that country for so much. He purported to have very good information concerning how much oil was to be exported and how much oil was to be needed by various countries. And to him that prospective business appeared as actual business. I have seen this over and over again. And I repeat: It would be just like Mr. DeAngelis to come to us and say, "I guarantee you that business."

Next I would say that this business would be

mostly in the nature of export business or selling oil, inasmuch as we had agreed and we knew that no further purchases were to be made by Bunge.

So this turnover would have to be generated by sales and not by purchases.

Q How did Mr. DeAngelis say that he was able to guarantee you that you would make any particular sale that you contemplated?

A Again it's a question of the word "guarantee." But I repeat: The word "guarantee" should have been put in quotation marks because this was exactly like Mr. DeAngelis to say, "I will guarantee you."

Q Was the understanding that any sales that Bunge was able to make abroad, Allied would sell the merchandise to Bunge at $2 a ton less than the sales price that Bunge had with its foreign customer?

A Well, in essence this would be the result, yes.

Q And was it understood between you and Mr. DeAngelis that you would be able to make the sales abroad without any consultation with Mr. DeAngelis as to the price on the sales abroad, and then he would simply sell the merchandise at $2 a ton less than for what you sold it abroad?

A I don't believe there was any specific

conversation regarding this. I believe DeAngelis was aware of the fact that Durgo would not have thrown this merchandise away; wouldn't have sold it below the going market. And probably he did rely on that: that we would act certainly in a commercial manner.

And while we were trying to make sales, we certainly would not dump this merchandise.

Q Essentially you would consult with him before determining whether to make a particular sale abroad at a particular price; is that right?

A It was not specifically discussed if and how we would consult with him.

Q You had done it in the past, had you not?

A What?

Q In connection with the Spanish transaction, for example?

A To discuss it with him?

Q Yes.

A To the extent of saying "We have this bid from Spain."

Q You did not have a bid from Spain; you made a bid to Spain, did you not, at a given price?

A I think we did have a bid from Spain.

Q You remember there were two 50,000-ton sales

that were made at about the same time in the beginning of July.

A We certainly -- according to my memory, we certainly had a bid, at least on the second part.

Q Yes, but on the first part you put in a bid, did you not?

A We made an offer.

Q You made an offer?

A Yes.

Q And you consulted with Mr. DeAngelis before you made the offer as to the price at which the offer would be made?

A We possibly -- I'm sure we had an offer from Mr. DeAngelis at a given price.

Q Which was $2 a ton less than the price at which you offered it to the Spanish Government?

A I don't know if it was exactly $2 a ton, but we added some price for Bunge.

Q And Mr. DeAngelis knew before you made your offer to the Spanish Government what price you were going to offer to the Spanish Government, did he not?

A Well, I assume he had a pretty good idea.

Q You knew that he had made an offer himself to the Spanish Government?

A I don't believe he made an offer himself, no. Although at times he would put offers, simultaneous offers through other channels also.

Q But you were not aware at the time that in connection with this first 50,000-ton sale he had made an offer on behalf of Allied; not through any other channel, but on behalf of Allied for that business?

A Where we were -- that we were making an offer on behalf of Allied?

MR. SCOTT: No.

MR. McCHORD: No.

MR. SCOTT: Wait a minute. The question, as I understand it, is: At the time that you made the offer on the first 50,000-ton transaction, that at or about the same time Tino was making an offer on his own account.

MR. McCHORD: For the same business.

MR. SCOTT: For the same business.

THE WITNESS: Did I know that?

MR. McCHORD: Yes.

THE WITNESS: I don't remember.

BY MR. McCHORD:

Q Would it seem peculiar to you if he had?

A Well, if you have anything that changes my

recollection, I will be glad to look at it.

Q I will just state for the record that this happened, and there are documents in Bunge's file that indicate that it happened. I am jut asking whether this is unusual or was usual.

A Excuse me. What would you like to know?

Q I want to know whether this is the sort of thing Mr. DeAngelis usually did or often did.

A Which thing?

Q That is, as I understand your testimony -- I don't want to put words in your mouth, but as I understand your testimony, at the time you made your offer to the Spanish Government you had an offer from Allied at a given price.

A Yes.

Q And you made your offer to the Spanish Government based on the offer you had from Allied.

A Right.

Q You included a certain profit for Bunge. And Mr. DeAngelis knew approximately what the profit for Bunge would be. So he would know what price you were offering to the Spanish Government. This is all correct, is it not?

A Yes.

Q And at the same time the documents in Bunge's

file indicate that Mr. DeAngelis made an offer to the Spanish Government on behalf of Allied for the same business at a different price.

A Yes.

Q My first question to you was: Did you know at the time that he was doing that? And you said you don't recall.

A No.

Q That is correct, is it?

A That's correct.

Q My next question was: Was having done this something that was unusual? In other words, did Mr. DeAngelis do similar things?

A Such as putting out more than one offer to the same --

Q That is right.

A No, he did that other times.

Q And then he put out offers at different prices, did he not?

A Probably.

Q And sometimes directly for the account of Allied and sometimes through other exporters such as Bunge; is that also correct?

A I would say mostly through other exporters.

Q As far as this agreement for the guarantee is concerned, was this agreement carried out?

A No. Certainly not in full.

Q To what extent was it carried out?

A I don't know the exact amount of business that was done subsequent to this. The agreement as such was not fully carried out.

Q The agreement refers to an understanding that if the over-all figure of 500,000 tons is not reached, the per-ton margin will be increased so as to reach the target intended margin of $1 million.

Was there any increase that occurred later on in the margin on Bunge's transactions with Allied pursuant to this agreement?

A I don't believe so.

Q Do you recall any occasion on which you or others at Bunge told DeAngelis thatyou were not making enough money from your relationship with Allied and he ought to increase the margin on any particular deal?

A It might have been on occasions, on one or two deals, Bunge might have asked for -- or might have pointed out to Allied that Bunge wanted to have a higher margin of profit.

Q And this only happened once or twice?

will revert to this when we presume stocks will again rise.

So they might have assumed that it wasn't urgent because the stocks declined. But this is an assumption from reading this paragraph.

Q Do you recall any discussion at or about this time -- that is, July and August 1962 -- with anyone at Bunge regarding the question of whether Allied's insurance policy, which at that time covered these goods, covered against fraudulent acts on the part of Allied or misfeasance on the part of the employees of the various storage companies?

A No, sir.

Q I will ask for you to look at Exhibit 141, please. I will ask you if you saw this letter at or about the time it was received by Bunge.

A Your question was whether I saw this letter?

Q Yes.

A I would say in all probability I did. This letter was written by Norton to the insurance department of Bunge. It was sent by Mr. Schroeder to Mr. Kenner.

This is the handwriting of Mr. Kenner, I believe (indicating). Mr. Kenner put my name on it. And the name is crossed out. So I would say that in all probability I saw it. I read it.

A No, sir. In fact, I must say I was not quite aware of that.

Q You were not aware of that?

A No, sir.

Q Did Bunge have any policy in November of 1962 regarding reducing the Allied account?

A In 1962 or 1963?

Q 1962.

A Regarding reducing the Allied account?

Q Yes.

A Well, I think that was a constant policy. It certainly was in force then, as it had been in September, as it was later on. It was something that we wanted to accomplish at every -- every time.

Q Would you refer, please, to Exhibit 114.

Do you recall anything about the series of loans referred to in this letter?

A Well, I would like to say I have no recollection as to whether this particular operation was actually agreed to. If I had to guess, I would say no, or not completely.

I can only say: This was a request. Probably this followed a verbal request -- this particular letter followed a verbal request. I do not remember now whether this was done or not done.

happened onthat date.

Q I will show you a document of twelve pages, I have numbered the pages at the bottom left-hand corner myself. And the number on the top sheet is 90213167. And the other pages run consecutively from 90213195 through 90213205. I will ask you whether this is an example of the position reports about which you have just been testifying.

A Yes.

Q It is my understanding that you normally received the whole document; that is, both the summary sheet on the top and the detail that supported it; is that right?

A Yes.

Q Was the summary sheet circulated among others at Bunge?

A Yes. The recapitulation or summary sheet was sent to Mr. Klein either -- as it appeared -- as a copy of what I received, and in some cases maybe a further condensation might be made and besubmitted to Mr. Klein. Further, Mr. Fornari got a copy. I don't know if anybody else did. Maybe the so-called finance department got one.

Q Did Mr. Fornari also get the detail or did he just get the summary sheet?

A I don't remember whether we kept one copy

between the two of us or he got an extra copy. That might have varied. I don't know.

MR. FORNARI: Off the record.

(Discussion off the record.)

A (Continuing) One copy between the two of us. I mean it was accessible to both.

Q Who was it that decided the format in which this report would be made up?

A This here (indicating)?

Q Yes.

A I think there was sort of a process of evolution. I don't know if you have any records. Some of the original ones which were kept in handwriting by Mr. Groeneveld.

Q But basically you told him what information you wanted?

A Yes.

Q And he prepared it in the form in which you wanted it; is that right?

A That's right. And then, as the business expanded, maybe some sub-groups or sub-classifications or subdivisions had to be thought of and broke it down to make it more intelligible.

Q What I am getting at here is whether Mr.

Groeneveld was essentially carrying out your wishes as to the form and the type of information --

A Yes.

Q -- that was to be given when he prepared these reports?

A Yes.

Q Did you keep a file of these position reports?

A I would say for a certain time I would keep a file in my drawer, and then if I didn't need it any longer, it was becoming obsolete, I was either giving it back to Mr. Groeneveld or sending it to general files.

Q Who was it that decided when a particular position report would be prepared? Was it that you asked Mr.Groeneveld to do it or did he just decide to do it?

A I would say that generally speaking that was done in accordance with needs and changes. In other words, if there had been no change either in extension of new loans or in new commercial operations with Allied, and there had been no changes in the market value of the oil, then perhaps I would tell Groeneveld, "You might skip a week or just make a very rough one and say that everything is unchanged."

Occasionally, although seldom, if changes had occurred twice during a week or even three times, con-

ceivably I would have told him, "Make a new position again."

Q What did you use the back-up information, the information supporting the summary sheet for?

THE WITNESS: Excuse me. Repeat the question.

(The last question was read by the reporter.)

THE WITNESS: I'm sorry. I don't understand your question. Rephrase it.

Q For example, did you use it to keep track of whether Allied was meeting its commitments as to purchases and sales?

A No. Primarily the purpose was to see if the market value of the oil -- the current value -- let me put it this way -- of the oil was higher or lower than the amount of money which had been lent to Allied. Or in other words, whether margins were required from Allied.

Q That information is all shown on the summary sheet, is it not?

A Yes. It should be shown here, yes.

Q My question was: What did you use the detailed information for?

MR. SCOTT: If anything.

MR. McCHORD: If anything, yes.

A Well, first of all, Mr. Groeneveld needed the details in order to arrive at the totals. At times,

especially concerning some of the so-called commercial transactions, I would be interested in knowing exactly what type of commitments we had; whether we had to ship a sale to Morocco or to Spain or to some other place.

From a commercial standpoint, first of all, I wanted to be sure that these sales would be fulfilled property and in due time.

I wanted to follow that generally. Although it was more the responsibility of Groeneveld to see to it that they were fulfilled. And occasionally I might use some of this information for commercial purposes.

Q How about the information as to the particular collateral held for loans? How did you use that information, if at all?

A That -- I would use that information primarily -- again from the standpoint of value and from the standpoint of deciding if I felt we had an excess of crude soybean oil versus refined soybean oil, I would try to generate a sale, to sell some of the oil which maybe we had a surplus of.

Q You kept track then of the amounts of the various grades of oil that you held as collateral?

A No, I didn't keep track. I mean I would examine this report and form an opinion upon examination

of it.

Q And you are looking at the third page of the report which is headed up at the top "Warehouse Receipt No. 2 Account"?

A That's right.

Q Would you tell me what type of transactions are shown in the Warehouse Receipt No. 2 Account.

A This list -- this is essentially a list of invoices reflecting sales of crude soybean oil, which were supposed to be processed through a plant at Mapleton.

So the first column shows the dates, and the second shows the invoice number; the third the sales number, and the corresponding purchase number; the amount of pounds, the type of oil and the value, the extension of it.

Q These transactions that you have just been referring to are under the heading "Soybean Oil Sold F.O.B. Decatur, Bloomington and Galesburg and being processed through Mapleton"; is that right?

A That's right.

Q This was all oil that Bunge had bought through some supplier --

A Correct.

Q -- and had sold to Allied; is that right?

scale that he was paying it to Bunge? When I say "scale" here I am talking about the rate.

A It was my assumption, yes.

In one case he had come to us asking to reduce the rate of interest from seven to six per cent, alleging that other parties would only charge the six per cent rate. I think there is a letter to that effect.

Q The seven per cent rate that you were talking about was not all there was to the heavy carrying charges that he was paying to Bunge, was it?

A No. It was one of the elements. But you asked me whether this was in line with the rate of interest that others were charging. And I say that in general I believe it was, although he was trying to have it reduced to six.

Q I don't want to argue here, but you were charging $2 a ton per month as a handling charge on the American Express loans at this time, were you not?

A Yes.

Q This was approximately one per cent per month, was it not, on the amount loaned?

A Well, that would depend on the length of the transaction.

Q But these loans stayed outstanding for a month,

did they not?

A Well, as a term, that would be correct, if it was standing only one month.

Q And on top of that you charged seven per cent interest, did you not?

A Yes.

Q So the effective return that you got for your loans was on the order of nineteen to twenty per cent, was it not?

A I believe if you total everything, it was.

Q Was it your understanding that Mr. DeAngelis was paying his other creditors --.

A Was paying --

Q -- was paying his other creditors remuneration for loans at approximately the same percentage rate?

A Yes.

Q Did you believe his statement that he could operate profitably paying interest at the rate of twenty per cent, roughly, on $36 million worth of loans?

A Well, I would say if his judgment of the market was a good one, I felt he certainly could afford to do it.

Q Do you recall any discussion in the fall of 1963 that you had with Mr. DeAngelis or anyone else at Bunge regarding the question of who it was that you thought

Excerpt of Deposition of Richard D. Forti,
Taken in *Seligson* v. *Bunge Corp.*

factors of that nature.

He was given the opportunity, the overall responsibility of the legal and administrative relationship between Bunge and Allied.

I hope I am making this clear.

Q I understand that, I think, and I just want to be sure that Kenner's role in the Oil Department was more Bunge and Allied rather than Bunge and the entire oil operation, is that correct?

A Yes.

Q In other words, and the business decisions concerning the relationship between Bunge and Allied were not something that was discussed with Mr. Kenner, but he rather made sure that the proper formalities were observed after the business decisions had been made by you, Mr. Fornari and Mr. Klein; is that correct?

A Correct.

Q I show you a memorandum dated June 22, 1962 and I ask you if you are familiar with this.

A Judging by the appearance of this, I would say it is a memorandum or a memorandum for discussion written by Mr. Kenner.

Q Did you have any familiarity with that at or about the time it was prepared?